EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 90-1982

FILED
JUN 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf of KAREN JONES, an Incompetent, and MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI LIBERTY CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

NWABUEZE V. OKOCHA
Counsel of Record
Okocha & Associates Co., L.P.A.
409 Investment Building
601 Rockwell Avenue
Cleveland, Ohio 44114-1602
(216) 574-9400
Counsel for Petitioners

Of Counsel:
ALVARENE N. OWENS
Alvarene N. Owens Co., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether states may condition access to their courts in actions brought under 42 U.S.C. §1983 by burdening and imposing obstacles for plaintiffs which otherwise did not apply in federal courts?

2. Did a Local School District who takes custody of a schoolchild and places her in a position of danger such that she was sexually abused by the agents of the School District contracted to transport her to school enough to trigger the protection of the Due Process Clause for purposes of §1983 liability?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTIONAL STATEMENT 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

Facts 7

REASONS FOR GRANTING REVIEW 13

I. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.. 13

II. THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT'S OPINION IS IN CONFLICT WITH THE OPINION OF OTHER CIRCUIT COURTS... 15

III. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIES 16

CONCLUSION..... 21

APPENDIX:

Order of the Supreme Court of Ohio Overruling Motion to Certify (March 27, 1991) A1

Opinion of the Court of Appeals of Montgomery County, Ohio (October 3, 1990) A2

Decision and Entry of the Court of Common Pleas of Montgomery County, Ohio *Re* Protective Order and Motion to Quash (January 12, 1989). A15

Decision and Entry of the Court of Common Pleas of Montgomery County, Ohio Sustaining Motion to Amend Complaint (January 12, 1989) A18

Decision and Partial Summary Judgment Entry of the Court of Common Pleas of Montgomery County, Ohio (November 8, 1989) A20

Entry of the Court of Common Pleas of Montgomery County, Ohio (March 16, 1989).... A26

Second Amended Complaint and Demand for Jury Trial Edited by the Court of Common Pleas..... A28

Plaintiff's First Amended Complaint and Demand for Jury Trial A38

TABLE OF AUTHORITIES

Cases

Brown v. Western Railway of Alabama, 338 U.S. 249 (1949) 17,18

Cornelius v. Town of HIghland Lake, Ala., 880 F.2d 348 (11th Cir. 1989) 15

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 14

DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989) 13,14

Felder v. Casey, 487 U.S. 131 (1988) 16

Goldberg v. Kelly, 897 U.S. 254 (1970) 20

Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444 (1989) 17

Gross v. Lopez, 410 U.S. 565, 573 (1975) 20

Howlett by and through Howlett v. Rose, 110 S. Ct. 2430 (1990) 17

J.O. v. Alton Community Unit School District II, 900 F.2d 267 (7th Cir. 1990) 15

Jett v. Dallas Independent School District, 109 S. Ct. 2702 (1989) 17

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989) 15

Maine v. Thiboutot, 448 U.S. 1 (1980) 19

Martinez v. California, 444 U.S. 277 (1980) 18

McHenry v. Chadwick, 806 F.2d 184 (6th Cir. 1990) 15

Nishiyama v. Dickson County, Tenn., 814 F.2d 277 (6th Cir. 1987) 15

Plyler v. Doe, 457 U.S. 202, 216 (1982) 14

Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 10 S. Ct. 840 (1990) 15

Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988) 15

West v. Atkins, 487 U.S. 42 (1988) 20

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 15

Zinermon v. Burch, 110 S. Ct. 975 (1990) 17

Constitution and Statutes

U.S. Const., Amend. XIV 4,5,14

20 U.S.C. §§1400 *et seq.* 7

42 U.S.C. §1983 (1982) ..... *passim*

42 U.S.C. §1988 (1976) 18

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf
of KAREN JONES, an Incompetent,
and MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI LIBERTY
CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioners Mary Jones and Karen Jones respectfully urge a writ of certiorari issue to review judgment and opinion of the Ohio Court of Appeals for the Second Appellate District, rendered October 3, 1990.

OPINIONS BELOW

On March 26, 1989, the Court of Common Pleas, Montgomery County, Ohio, *sua sponte* edited Petitioners' complaint, removing allegations in support of Petitioners' claim for relief under §1983. A copy of the order is appended at Appendix A26-A27 and is unpublished. Petitioners complied with the court orders with reservation of rights.

On November 8, 1989, the Court of Common Pleas entered summary judgment in favor of Respondent Dayton Board of Education on the basis of sovereign immunity. A copy of the order is appended at Appendix A20-A25 and is unpublished.

The judgment sought to be reviewed is final and dated October 3, 1990. A copy is appended at Appendix A2 and also unpublished. No petition for relieving was filed.

The Supreme Court of Ohio denied discretionary review on March 27, 1991. A copy of its order is appended at Appendix A1. No petition for relieving was permitted.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review by certiorari is conferred by 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . nor deny any person with its jurisdiction the equal protection of the laws."

This case involves 42 U.S.C. §1983 (1982), which provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action was filed in the Montgomery Court of Common Pleas, Ohio, by Petitioners Mary Jones, mother and guardian of Karen Jones and Mary Jones against the Respondents Dayton Board of Education (hereinafter referred to as "DBOE"), Miami Liberty Cab Company (hereinafter referred to as "MLCC") and Eddie Slaughter on October 22, 1987. At the heart of this suit is that on November 16, 1986, MLCC dispatched Slaughter to transport Karen Jones. Significantly, Karen Jones is a profoundly retarded, blind and multi-handicapped student of the Dayton Public School System. While Karen Jones was under the custody, control and supervision of DBOE, Slaughter in MLCC's cab, sexually assaulted Karen Jones. As a result of the sexual assault, Karen Jones became pregnant and gave birth to Sally Jones on August 9, 1987.

On December 22, 1988, Petitioners moved to amend their Complaint seeking redress for violations of their civil and constitutional rights under the Fourteenth Amendment to the United States Constitution. Attached to the motion was the proposed First Amended Complaint containing six claims: violation of civil and constitutional rights pursuant to 42 U.S.C. §1983; assault; breach of duty to protect; invasion of privacy; and loss of society and companionship. On January 12, 1989, the court granted the motion, and on January 13, 1989, the First Amended Complaint was filed.

The First Amended Complaint alleged that the DBOE placed Karen Jones in the cab and forgot her. As a result, Petitioner Karen Jones, was sexually assaulted by Eddie Slaughter, a taxicab driver of MLCC while transporting Karen Jones to Ohio State School for the Blind ("OSSB"), in Columbus, Ohio. It is this pernicious

practice, custom and policy, prior and subsequent to the sexual assault by Slaughter, of reckless or deliberate indifference to or gross negligence by the DBOE and MLCC that precipitated the deprivation of Petitioner's constitutional rights to be free from sexual abuse as well as severe mental anguish, embarrassment, humiliation and emotional distress.

On January 25, 1989, Petitioners filed another motion to amend their First Amended Complaint to add additional party plaintiff, Sally Jones. On January 31, 1989, the court denied the motion to amend. On February 1, 1989, Petitioners requested reconsideration of the court's decision. On February 3, 1989, the court reversed its decision, redrafting the Second Amended Complaint and excising all the claims or causes of action, stating that claims or causes of actions should be developed by motions or at trial. Because the proposed Second Amended Complaint was identical to the First Amended Complaint previously filed and the pleading met the specificity and particularity requirements of federal practice in a §1983 litigation, the trial court claimed it was "replete with superfluous and unnecessary allegations, conclusions of law and ... verbose." Petitioners then filed the Second Amended Complaint with reservation of rights consistent with the mandate of the court.

On November 8, 1989, the trial court awarded the DBOE's Motion for Summary Judgment, dismissing the Second Amended Complaint as to the DBOE and concluding that: "Section 1983 does not provide for violation of duties of care arising out of tort law; and the DBOE was immune from liability pursuant to Ohio Revised Code Chapter 2744, with prejudice and that

there was no just reason for delay in entering this judgment and denying Petitioners Motion for Partial Summary Judgment.

Petitioners appealed to the Court of Appeals of Montgomery County, Ohio. Said court affirmed the trial court's dismissal of the DBOE. The Court of Appeals indicated that "the trial court's action had a significant effect upon the case of Plaintiffs-Appellants" Pet. App. A9, yet, concluded that the trial court did not abuse its discretion in redrafting and excising Petitioners' 42 U.S.C. §1983 claim.

This petition asks this Court to review the Court of Appeals' judgment reversing and remanding the trial court's order granting the DBOE's motion for summary judgment on the grounds of immunity, stemming from the fact that no immunity exists for the DBOE in the instant case.

Facts

The facts in the instant case are uncontroverted. Karen Jones is a profoundly retarded, blind and behaviorally disturbed student of Dayton City School District. DBOE is responsible for the governance of the Dayton City School District. Because of Karen Jones' handicap, she was specially educated under the Education of All Handicapped Act (hereinafter "EHA"), 20 U.S.C. §§1400 *et seq.* and state law consistent with the DBOE's statutory responsibility. Since Karen Jones is entitled to instruction from the Dayton City School District, DBOE contacted the Ohio State School for the Blind, Columbus, Ohio ("OSSB"), for placement of Karen Jones. Subsequently, DBOE entered into an agreement with the OSSB to an Individualized Educational Plan ("I.E.P.") for Karen Jones as mandated by federal and

state law. Under this program, DBOE had custody of Karen Jones and was obligated to transporting her from Dayton to Columbus and back.

From 1982 to December 1986, Mrs. Jones expressed serious concerns about the safety and security of her daughter, Karen Jones. According to the September 21, 1982 Staff Notes on Karen Jones:

> Dayton City does pay the bus fare for one other OSSB student and a chaperone to and from Dayton. To this date, Mrs. Jones has not been reimbursed for a chaperone for Karen. This year, Mrs. Jones does not have a chaperone to accompany Karen to and from Dayton.

In addition, Mrs. Jones was assured by Dennis Holmes, Superintendent, DBOE, of the protection and safety of Karen Jones. Despite the fact that the DBOE knew as far back as 1982 to provide for the safety of Karen Jones, a blind and multi-handicapped child, it failed to do so even after repeated demands from the OSSB. Indeed, OSSB discovered this outrage and advised DBOE to provide an aide or chaperone to accompany Karen Jones to Columbus, but DBOE failed to provide the aide or chaperone until after Karen Jones was sexually molested.

DBOE contracted with MLCC, a common carrier to transport its students, including but not limited to blind, deaf and retarded students, such as Karen Jones to schools. Significantly, there is no written agreement in effect in violation of state law. Thereafter, MLCC hired Slaughter as one of its taxicab drivers. Although Slaughter had no contract with either DBOE or OSSB, Slaughter was furnished by MLCC and transported Karen Jones in one of MLCC's cabs at the direction of DBOE. However, the DBOE directed the seating arrangement in the cab for Karen Jones from Dayton to

Columbus and vice-versa. MLCC hired Slaughter even though Slaughter was a known felon, alcoholic and substance abuser. Also, Slaughter had had his driver's license revoked. Consequently, such a driving and criminal record made Slaughter unfit to transport schoolchildren under Ohio law.

Moreover, the agreement between MLCC and Slaughter expressly provides in pertinent part:

> 4. *That [MLCC] will assume all responsibility for all damages to persons* or property resulting from the carelessness and negligence of Lessee while operating said automobile as a taxicab in conformance with this Agreement. (Emphasis added).

This indemnity provision expressly provides that MLCC is responsible for Slaughter's actions.

On November 16, 1986, MLCC dispatched Slaughter to transport Karen Jones to OSSB, Columbus, consistent with its arrangement with the Board. Along with Karen Jones, were two deaf and mute children. After dropping off the two deaf and mute children, Slaughter imposed himself on Karen Jones and engaged in sexual intercourse with her in the back seat of the cab. In order to cover-up the sexual assault perpetrated on Karen Jones, Slaughter bribed Karen Jones with a McDonald's hamburger so that Karen Jones would not disclose the incident. Subsequently, Slaughter pleaded guilty to sexual battery in the Franklin County Court of Common Pleas. Thereafter, Slaughter was incarcerated.

Before November 16, 1986, Slaughter had never seen Karen Jones or been to her home. In addition, all conversations between Karen Jones and Slaughter took place in MLCC's cab. Moreover, Slaughter had never

been to OSSB before he engaged in sexual intercourse with Karen Jones in a driveway of a supposed church building. In a like manner, DBOE directed that Karen Jones sit on the front seat by the cab driver. Thus, both DBOE and MLCC provided Slaughter with opportunity and the instrumentality to perpetrate the sexual assault. As a result of the sexual intercourse with Slaughter, Karen Jones conceived and became pregnant. On August 9, 1987, Petitioner Karen Jones gave birth to a baby girl, Sally Jones. A genetic testing administered on July 12, 1989, clearly shows that Slaughter is the natural and biological father of Sally Jones. The Juvenile Division of the Montgomery Court of Common Pleas declared that Slaughter is the father of Sally Jones.

Significantly, Karen Jones, though eighteen at the time of the incident, had a reading level at a second grade level. Although DBOE and MLCC knew the peculiar susceptibilities of Karen Jones, they breached their duty towards her by placing her in danger and increased her risk of harm, and failed to protect her from sexual abuse while under their custody, control and supervision. The duty of DBOE, MLCC and Slaughter to protect Karen Jones was even greater here because this child was blind and mentally retarded and in their custody, when she was sexually assaulted. When questioned concerning the benefits of the pregnancy on Karen Jones's I.E.P. goals, Dr. Elizabeth Hagton testifying on behalf of DBOE stated that "[e]ducationally I could never write a goal that would include pregnancy as an outcome." Also, Slaughter testified that if he did not do it some other cab driver would. The pregnancy completely devastated Karen Jones and disrupted her education. Presently, Karen Jones continues to suffer from the trauma of this violent act. Karen Jones has been severely and permanently

injured in that she conceived and bore a child, for which provision for care must be had and Karen Jones as an incompetent is unable to provide for Sally Jones's child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority. Furthermore, the trauma and anxiety is indelible.

In spite of Slaughter's sexual assault of Karen Jones, MLCC failed to discipline Slaughter even after investigating the incident and receiving directives from DBOE. Rather, MLCC ratified and condoned Slaughter's action in accordance with its agreement with Slaughter. Subsequently, the City of Dayton suspended Slaughter's license.

MLCC and DBOE knew that handicapped children under their custody, control and supervision needed greater care and protection from abuse by third parties. This incident of sexual abuse of a handicapped child by an ex-felon was clearly avoidable. Nevertheless, DBOE failed to take steps to protect the children under its custody and supervision.

On November 16, 1987, Petitioners filed this action in the Montgomery County Court of Common Pleas. Petitioners amended the complaint bringing additional claims for violation of Petitioners civil and constitutional rights pursuant to 42 U.S.C. §1983; assault, invasion of privacy, gross negligence, intentional infliction of emotional distress and loss of consortium or services. Later, Petitioner, sought to add Sally Jones, the trial court then, rewrote the complaint to somewhat of a general pleading. On March 28, 1989, the Petitioners filed the second amended complaint in accordance with the trial court's order.

In August 1989, Petitioners and Respondent DBOE filed Motions for Summary Judgment. Also, on September 8, 1989, Respondent MLCC filed its Motion for Summary Judgment. On September 15, 1989, Petitioners amended their Motion for Partial Summary Judgment.

On November 8, 1989, the trial court granted the DBOE's Motion for Summary Judgment. The court held that the DBOE was immune from liability pursuant to Ohio sovereign immunity statute and found no Section 1983 violation. Further, the trial court dismissed the Second Amended Complaint as to DBOE, with prejudice and that there was no just reason for delay in entering this judgment.

On December 4, 1989, the Petitioners timely filed their Notice of Appeal. The Court of Appeals for Second Appellate District affirmed, stating that the trial court properly excised Petitioners' Section 1983 claims. Although the court recognized an equal protection basis for Petitioners' claim, it upheld judgment, noting that the trial court's action had significantly deprived Peitioners of their Section 1983 claim.

REASONS FOR GRANTING REVIEW

I. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

Petitioners urge that the decision of the Ohio Court of Appeals for the Second Appellate District is contrary to prior opinion of this Court, and this Court should grant certiorari to correct this contradiction.

Comparing the facts of the instant case to those of *DeShaney v. Winnebago County Department of Social Services,* 109 S. Ct. 998 (1989), the court will find the significance of this question and the appropriateness of its determination in this case. Under *DeShaney*, it is not clear how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect, it is clear that at some point such actions create a duty. *DeShaney*, 109 S. Ct. 1005. This Court has found such a situation only in a custodial setting. This is the situation in this case.

In *DeShaney, supra,* the court considered it necessary to review the state's actions with regard to Joshua's claim to determine whether the state had placed him in greater danger or made him more vulnerable, even though he was in a non-custodial setting. *Id.* at 1006. Although the *DeShaney, supra,* decision held that a state had no constitutional duty to protect a child, Joshua, from attacks by his father even though the state had received reports of the father physically abusing the child, 109 S. Ct. at 1001, it nonetheless, establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to such

violence beyond the level it would have been at absent state action's.

The present case obviously raises the question which this court noted to be still in need of resolution in *DeShaney*. Unlike *DeShaney*, the Petitioners submit that Respondents adopted and implemented policies deliberately indifferent to Karen's constitutional rights; they were charged to protect her since the DBOE took custody of her. Respondents had established a special relationship with Karen, and that the DBOE played an active role in the creation of the danger to Karen; and finally, that the DBOE's practices violated the Equal Protection Clause.

As the court noted in *DeShaney*, the state may not "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 1004 n.3. The Equal Protection Clause of this Court has repeatedly ruled that the Equal Protection Clause mandates requires a state to treat all similarly situated persons alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Ohio Court of Appeals in the present case admits that an Equal Protection Clause claim may apply for the DBOE different treatment of a similarly situated student under its custody. Since DBOE provided an aide or chaperone for another white handicapped student in the OSSB, and refused to do so with respect to Karen, in spite of repeated demands and promises, it violates Karen's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Given this Court's rulings, the *Jones* opinion is definitely contrary to previous United States Supreme Court rulings. Therefore, Petitioners urge that the decisions of the Ohio Court of Appeals for the Second Appellate District, *vis-a-vis* the facts of the instant case, is contrary to Supreme Court precedent.

II. THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT'S OPINION IS IN CONFLICT WITH THE OPINION OF OTHER CIRCUIT COURTS.

The Court should grant the instant petition because the *Jones* case is contrary to the opinions of other circuit courts. The Third Circuit has ruled that a school district could be liable for its policies of deliberate indifference toward alleged abuse by one of its teachers. *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied,* 110 S. Ct. 840 (1990). The facts of the instant case are quite analogous to those of *Stoneking.*

The Seventh Circuit has ruled in the case of *J.O. v. Alton Community Unit School District II,* 909 F.2d 267 (7th Cir. 1990) that School authorities did not have affirmative duty under due process clause to prevent alleged sexual abuse by teacher, such that breach of that duty gave use to cognizable liberty interest claim.

Additionally, the Sixth, Ninth, Tenth and Eleventh circuits have established a person's right to be free from being placed in dangerous situations by government officials or agents. *See Leach v. Shelby County Sheriff,* 891 F.2d 1241 (6th Cir. 1989); *McHenry v. Chadwick,* 896 F.2d 184 (6th Cir. 1990); *Nishiyama v. Dickson County, Tenn.,* 814 F.2d 277 (6th Cir. 1987); *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989); *Watson v. City of Kansas City, Kansas,* 857 F.2d 690 (10th Cir. 1988); *Cornelius v. Town of Highland Lake, Ala.,* 880 F.2d 348 (11th Cir. 1989).

Because of the inconsistence among the Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, the Supreme Court should grant Certiorari and settle the apparent conflict of authority.

III. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIES.

This Court has expressly reserved the issue of whether state courts are obligated to entertain §1983 actions, but it has addressed the proper approach for state courts to take when entertaining federally-created actions. The decision of the Ohio Court of Appeals for the Second Appellate District, however, conflicts with decisions of this Court requiring state courts that entertain federally-created actions, including §1983 actions, to apply the entire federal cause of action with all its remedies.

In the present case, the Ohio lower court upheld the trial court's decision excising Petitioners' §1983 allegations from the pleadings. In essence, the Ohio trial court refused to accept Petitioners' federal claim. This procedural burden undermines and overrules the precedent of this Court, which bar the use of state policies that limit access to state courts by litigants with federal causes of action, and this Court has required state courts entertaining federal causes of action, including §1983 actions, to refrain from imposing state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action. *See e.g., Felder v. Casey,* 487 U.S. 131 (1988).

In *Felder v. Casey,* this Court admonished state courts that any state law that minimizes or bars governmental liability is inconsistent with the federal

civil rights law and principles mandate that such a state law must give way to vindication of federal right when that right is asserted in state court.

> "States, however, may no more condition the federal right to recover [under Section 1983] for violations of civil rights than bar that right altogether, particularly where those conditions grew out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, *see Martinez*, 444 U.S. at 284. *Ibid.* at 141-2 (emphasis added).

Because of the trial court's initial fixation on the Ohio sovereign immunity provision for DBOE, it is unable to appreciate the principle of preemption.

Moreover, this Court has made it clear that violations of the constitution and laws of the United States are exclusively remedied under §1983. *See, Howlett by and through Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Zinermon v. Burch*, 110 S. Ct. 975 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Jett v. Dallas Independent School District*, 109 S. Ct. 2702 (1989). The Ohio lower Court failed to address Petitioners' constitutional questions that were raised in the trial court and ruled upon, in conflict with the decisions of this Court. If this decision is allowed to stand, it will be an impediment to Plaintiffs bringing §1983 actions in state courts.

Also, in *Brown v. Western Railway of Alabama*, 338 U.S. 249 (1949), this Court indicated its willingness to reject state practices that unnecessarily burdened rights arising under federal law. In *Brown*, a strict state pleading rule resulted in the dismissal of the plaintiff's FELA complaint. This Court granted certiorari "because

the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "this federal right cannot be defeated by the forms of local practices," this Court reversed the dismissal. *Id.*

Although this Court has not addressed the precise issue of the obligation of state courts to entertain §1983 actions without regard to state procedures, it has required state courts to first define the scope of the §1983 action and to then apply all the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow a state immunity statute to be used as a defense to a §1983 claim, even though the actions were being litigated in state court. In rejecting the application of the state-created immunity, this Court made clear that federal law is controlling.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . The immunity claim raises a question of federal law.
>
> *Id.* at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

The present case also raises important issues as to the proper approach by state courts to §1983 actions. Many state courts are reluctant to abandon familiar state policies when entertaining §1983 actions. For example, in the present case, the trial court struck the

§1983 allegation *sua sponte* because the 1983 claim was pled with particularity and decided that there was no §1983 violation. However, the Court of Appeals tacitly admitted that there may have been a §1983 claim in this case, yet penalized Petitioners, claiming that the Second Amended Complaint did not contain a §1983 claim. This is a covert avoidance of federal claims by state court. Unless such relief is available in state court such federal state conflict remains, and state courts will penalize with impunity individuals who merely exercise their federal statutory rights. This conclusion follows directly from this Court's ruling in *Maine v. Thiboutot*, 448 U.S. 1 (1980) establishing that §1983 relief is available for federal statutory as well as constitutional violations. Because federal statutes are made binding upon state and local governments by the Supremacy Clause, every Section 1983 case involving a federal statutory claim necessarily involves some form of preemption under the Supremacy Clause. Thus, this case presents the opportunity for this Court to resolve the recurrent and troublesome question: the proper approach by state courts to §1983 actions. This Court has not dealt with this issue.

The initial questions that state and federal courts entertaining §1983 actions must address involve the scope of the §1983 cause of action. When federal courts define §1983 but find a gap or a deficiency in federal law, they are directed by the civil rights choice of law statute, 42 U.S.C. §1983, to look to state law for the appropriate policy.

When state courts entertain §1983 actions, however, there is an issue as to whether they may use their otherwise applicable state policies. Nonetheless, state courts must also go through the same process of defining

the scope of the §1983 cause of action. It is this threshold issue that state courts often overlook while rushing to decide whether state policies are inconsistent with the purposes of §1983 of burden §1983 litigation. Such questions, however, should only be asked after a state court has defined the scope of §1983 and required compliance with a state policy.

Because Karen has liberty interest to be free from sexual abuse, a substantive due process analysis by the lower Ohio court was necessary and appropriate to determine whether she is entitled to be protected by DBOE. *See Gross v. Lopez*, 419 U.S. 565, 573 (1975) (entitlement to public education under state law); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing entitlement to welfare under state law). Since Karen was entitled to be transported to OSSB. The fact that DBOE had subcontracted away the transportation of Karen does not relieve the DBOE of liability in light of *West v. Atkins*, 487 U.S. 42 (1988). The Board retains responsibility.

By failing to first define the scope of the federally-created §1983 cause of action, the Ohio lower court departed from the approach this Court has followed in construing federally-created actions, including actions authorized by §1983. We believe that this petition should be granted, to preserve Petitioners' statutory rights, to reaffirm this Court's ruling and to prevent the creation of new and unauthorized requirements for §1983.

CONCLUSION

Because the decision below directly conflicts with this Court's prior ruling, creates a new and unauthorized exception to Section 1983 relief and presents a recurrent and important federal question that should be resolved by this Court, a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

NWABUEZE V. OKOCHA
Counsel of Record
Okocha & Associates Co., L.P.A.
409 Investment Building
601 Rockwell Avenue
Cleveland, Ohio 44114-1602
(216) 574-9400
Counsel for Petitioners

Of Counsel:
ALVARENE N. OWENS
Alvarene N. Owens Co., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated March 27, 1991)

Case No. 91-31

THE SUPREME COURT OF OHIO

MARY JONES, *et al.*,
Appellants,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Alvarene N. Owens.

(Court of Appeals No. CA11933)

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Rendered October 3, 1990)

Case No. 11933

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

MARY JONES, *et al.*,
Plaintiffs-Appellants,

vs.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants-Appellees.

OPINION

Oral argument heard on the 4th day of September, 1990.

Opinion rendered on the 3rd day of October, 1990.

HOWARD P. KRISHER
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402-1908
Attorney for Defendant-Appellee
Dayton Board of Education

ALVARENE N. OWENS
1101 Salem Avenue
Dayton, Ohio 45406

NWABUEZE V. OKOCHA
650 Rockefeller Building
614 Superior Avenue
Cleveland, Ohio 44113
Attorneys for Plaintiffs-Appellants

GREGORY T. SCOTT
111 West First Street, Suite 523
Dayton, Ohio 45402
Attorney for Defendant-Appellee
Eddie Slaughter

ROBIN FREEMAN
ROBERT A. BURKE
P.O. Box 1488
Springfield, Ohio 45501-1488

JOHN PETZOLD
900 Talbott Tower
Dayton, Ohio 45402
Attorneys for Defendant-Appellee
Miami Liberty Cab Co.

[2] GRADY, *J.*

I

FACTS

This appeal arises from an action brought in the Common Pleas Court by Plaintiffs-Appellants Mary Jones, mother and guardian of Karen Jones, against Defendants-Appellants Dayton Board of Education, Miami Liberty Cab Company, and Eddie Slaughter. The Complaint was filed October 22, 1987. It alleged that on November 16, 1986, Karen Jones, a blind and multiple handicapped student of the Dayton Public School System, had been sexually assaulted by Eddie Slaughter, a taxi cab driver under contract to Miami Liberty Cab

Company, while he was transporting Karen Jones to the Ohio State School for the Blind in Columbus, Ohio, under and according to a contract agreement between Miami Liberty Cab Company and the Dayton Board of Education. The Complaint further alleged that as a result of the assault Karen Jones gave birth to a child. The Complaint demanded that Mary Jones, Karen Jones and the child, be compensated for expenses of a medical and psychological nature as well as for the cost of maintaining Karen Jones and her minor child, and for related expenses.

On December 22, 1988, Appellants moved to amend their Complaint to add additional claims for relief based upon a [3] violation of civil rights. On January 12, 1989, the court sustained that motion, and on January 13, 1989, the Amended Complaint containing those additional allegations and claims for relief were filed.

On January 13, 1989, Plaintiffs, with the prior leave of court, filed their first amended complaint, adding to their cause of action allegations and claims based on 42 U.S.C. Section 1983, Deprivation of Civil Rights Under Color of Law.

On January 25, 1989, Plaintiffs filed a motion to amend their first amended complaint to properly reflect the full names and identities of all parties plaintiff. On January 31, 1989, the court denied the motion to amend. On February 1, 1989, Appellants renewed their motion. By Decision and Entry filed February 3, 1989, the court reserved its decision on the motion, indicating to counsel for Appellants its approval was conditioned upon a reformation of the complaint to conform to the provisions of Civ. R. 8 concerning brevity and plainness. The court observed that: "The tendered second amended complaint is replete with superfluous and unnecessary

allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend." The court indicated that it would review the tendered second amended complaint to determine if it conformed with the court's directions, and that failure to conform might result in denial of leave to amend.

[4] Appellants tendered their second amended complaint to the court. By Entry filed March 16, 1989, the court stated:

> "The Court has carefully reviewed this document and concludes that there has been little, if any, compliance with the Decison and Entry of this Court of February 3, 1989. While it certainly is not the province of the Court to draft pleadings for parties, be they plaintiff or defendant, in the interests of justice and judicial economy, the Court has carefully examined and excised that material in the tendered Second Amended Complaint which does not conform to the Civil Rules. A copy of this edited document is enclosed with this Decision and Entry.
>
> If counsel for Plaintiffs desires to pursue this litigation any further, they are instructed to prepare a Second Amended Complaint in accordance with the edited copy enclosed, provided it is tendered to the Court within 14 days after this Decision and Entry is served and journalized. If counsel declines to follow the instructions of the Court, the Court will consider the dismissal of this action for want of prosecution."

On February 10, 1989, Appellants tendered a Second Amended Complaint in compliance with the court's directions. The document contained numerous excisions in the form made by the court.

Motions for summary judgment were filed by Dayton Board of Education, Miami Liberty Cab Company, and Mary Jones. The court denied the motions

of Miami Liberty Cab Company and Mary Jones as not well taken on any of the issues raised. The court found in favor of the Dayton Board of Education upon the single issue argued in its motion; that [5] the action against the Dayton Board of Education is barred as a matter of law pursuant to R.C. 2744.02, the Political Subdivision Tort Liability Act. The court found that the Dayton Board of Education is a political subdivision and was engaged in performing a governmental function at the time of the act alleged; that is, it was providing a system of public education and is immune from liability because its actions did not fall with any of the exceptions provided in the statute.

The court's decision on all motions for summary judgment was entered November 8, 1989. The court found, pursuant to Civ. R. 54(B), no just reason for delay in resolving the determinations made. Mary Jones filed a notice of appeal from the judgments of the court on December 4, 1989. A second 54(B) order was filed December 4, 1989. A Notice of Appeal was thereafter filed by Miami Liberty Cab Company on January 2, 1990. The matter is now before the court upon assignments of error brought by Mary Jones and Miami Liberty Cab Company.

II

REFORMATION OF THE COMPLAINT

Plaintiff-Appellant Mary Jones alleges error on the part of the trial court in its orders of February 3, and March 16, 1989, allowing her to file a Second Amended Complaint only after certain matters were stricken from the proposed pleading.

[6] Civ. R. 15(A) provides that, after a responsive pleading has been served, a party plaintiff may amend his pleading only by leave of court or by written consent of the adverse party. The Rule provides that leave of court shall be freely given when justice so requires. This liberal amendment provision has been held to reflect two policies.

> First, a liberal amendment policy provides the maximum opportunity for each claim to be decided on the merits rather than on procedural deficiencies.
>
> Second, the Rule reflects the fact that the pleadings are assigned the limited role of providing the parties to a lawsuit with *notice* of the nature of the pleader's claim or defense. Discovery is available to paint a more detailed picture of the facts and issues. See, also, *Foman v. Davis* (1962), 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222.

Hoover v. Sumlin (1984), 12 Ohio St. 3d 1, 5, quoting Wright & Miller, Federal Practice and Procedure (1971), 359, Section 471.

Grant or denial of leave to amend a pleading is within the sound discretion of the trial court. Where the pleading is tendered timely and in good faith, and no reason is apparent or disclosed for denying leave, the denial of leave to file such an amended pleading or the subsequent striking of matter from an amended pleading is an abuse of discretion. *Hoover v. Sumlin, supra*, *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 297 N.E. 2d 113.

In making its orders the trial court observed that the [7] "amendments now sought to the Complaint should never have been required had the complaint been properly drafted in the first instant, and certainly not after a delay of sixteen months". (Decision and Entry, February 3, 1989). The court then went on to recite its

concern that the pleadings in the Second Amended Complaint were inconsistent with Civ. R. 8, finding the "tendered Second Amended Complaint is replete with superfluous and unnecessary allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend". The court then gave the plaintiffs an opportunity to reform the Complaint to meet the court's concerns.

It appears from the record that Plaintiffs-Appellants failed to conform to the court's requirements. In the later Decision and Entry of March 16, 1989, the court edited the proffered Second Amended Complaint by striking from it a number of paragraphs and part-paragraphs. Plaintiffs-Appellants then filed that document in the form as edited.

The numerous changes made by the trial court through its editing process removed a number of superfluous matters from the pleadings. However, the court also removed entirely all allegations in support of Plaintiffs-Appellants' claim for relief brought pursuant to 42 U.S.C. Section 1983.

The parties are usually afforded great latitude in framing their allegations, claims for relief, and defenses. [8] Under modern pleading rules the primary intent of the pleading stage is to provide notice of the pleaders' claims or defenses. Factual determination, issue narrowing, and elimination of frivolous matters are now largely accomplished by discovery, pretrial conferences, and summary judgment. However, when the court is asked leave to amend a pleading already filed, the court has broader discretion to deny leave or control its use. The court may restrict the requested change on a finding that it would seriously impair the progress or course of the litigation. The court may thus deny leave to amend

pursuant to Civ. R. 15(A). It may also, on its own motion, "order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter". Civ. R. 12(F).

Though the trial court's action had a significant effect upon the case of Plaintiffs-Appellants, we conclude that the trial court did not abuse its discretion in striking certain pleadings. The court observed that the claim for relief could have been included in the original complaint filed sixteen months earlier. Further, it is clear that the Plaintiffs-Appellants wholly ignored the orders of the trial court to reform their pleadings to present them as a plain and direct statement of their claim for relief, as required by Civ. R. 8. Under those circumstances, and because the court clearly explained the [9] reasons for its action, we cannot find that the court's actions constitute an abuse of discretion under the rule of *Hoover v. Sumlin, supra.*

The assignment of error will be overruled.

III

SUMMARY JUDGMENT IN FAVOR OF DAYTON BOARD OF EDUCATION

In its Decision and Entry granting summary judgment to the Dayton Board of Education, the trial court found that the Dayton Board of Education is a political subdivision and was performing a governmental function at the time of the alleged incident, that is, providing a system of public education. The court also found that the Dayton Board of Education does not fall within any of the exceptions provided by R.C. Chp. 2744 because Eddie Slaughter was not an employee of the

Board, which exercised no control over him. The court concluded that by reason of the operation of R.C. 2744.02 the Dayton Board of Education was immunized from the common law tort claim brought by Plaintiffs and it granted summary judgment to the Board.

In *Mosley v. Dayton City School District* (July 6, 1989), Montgomery App. No. 11336, unreported, this court found that the Dayton City School District and School Board were political subdivisions as defined by R.C. Chp. 2744 and thus entitled to immunity under the provisions under that statute. The same facts and considerations apply in the case now before us. Thus, we find that the trial court did [10] not err in finding that Defendant-Appellee Dayton Board of Education was immunized under the provisions of that statute from the claims brought by Plaintiff-Appellant.

Plaintiffs-Appellants have set up a number of assignments of error claiming that the trial court erred in granting summary judgment to the Dayton Board of Education because R.C. Chp. 2744 has no application to a claim brought pursuant to federal law. In particular, they rely on their claims for relief brought pursuant to 42 U.S.C. Section 1983, though they also allege general federal constitutional provisions concerning right of privacy and equal protection.

We agree that state governmental immunity statutes do not apply to claims based on federal civil rights violations, particularly those brought pursuant to Section 1983 which require a showing of state action. *Felder v. Casey* (1988), 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed. 2d 123. *Martinez v. El Paso County* (1987 D. Colo.) 673 F. Supp. 1030. *Watson v. McGee* (1981 D.C. Ohio) 527 F. Supp. 234. However, those matters were not before the court at the time it granted summary

judgment. The only claims for relief before the court were in the original Complaint filed October 22, 1987, which were based entirely on common law tort theories and contained no claims for relief brought pursuant to federal law. Therefore, Plaintiffs-Appellants' arguments concerning the application of 42 U.S.C. Section 1983 and other provisions of federal constitutional and [11] statutory law in opposition to the summary judgment are not well made.

Plaintiffs-Appellants also allege liability on the part of the Dayton Board of Education in its failure to comply with the requirements of 84 Stat. 175, as amended, 20 U.S.C. Sections 1400 et seq. Those provisions, the Education of All Handicapped Children Act, require that the states identify all handicapped children and provide them with free appropriate public education, including special education and related services designed to meet their unique needs, and to assure that the rights of handicapped children and their parents or guardians are protected. In Ohio, the State's duties under the Act have been delegated to local boards of education pursuant to R.C. Chp. 3233. Those provisions have been construed to provide that "related services" includes the transportation necessary to assist a handicapped child to benefit from special education, including transportation outside the school district of his residence. 1978 Ohio Atty. Gen. Ops. No. 026.

Plaintiff-Appellant alleges that the Dayton Board of Education breached the duty it owed Karen Jones under the foregoing provisions by failing to provide her safe transportation. We do not agree. While there may be a basis for a federal claim in this concept, particularly as regards equal protection of the law, those matters have not been included in the Complaint on which the court

granted [12] summary judgment. The remaining bases in state law do not constitute a duty breached by the Board of Education by reason of the sexual assault performed by its contractor, Eddie Slaughter. The purposes of Ohio's Act are to meet the federal requirements concerning education of handicapped students and do not impose any special or particular duty concerning safety that was breached by Slaughter's crime. Furthermore, the facts presented to the court in support of and in opposition to the motions for summary judgment support the court's conclusion that the assault was simply not foreseeable to the Dayton Board of Education when it made its transportation arrangements with Miami Liberty Cab Company.

We conclude that the trial court did not err in finding that as to the Dayton Board of Education there was no question as to any material fact and that as a matter of law the Board was entitled to immunity under R.C. 2744.02. The various assignments of error brought by Plaintiffs-Appellants in respect to that matter will be overruled.

IV

SUMMARY JUDGMENTS DENIED

Cross-Appellants Eddie Slaughter and Miami Liberty Cab Company have each assigned the same error; that the trial court erred in finding that its denial of their respective motions for summary judgment were final, appealable orders as defined by R.C. 2505.02 and that as to those orders there [13] was no just reason for delay as provided by Civ. R. 54(B).

R.C. 2505.02 provides in pertinent part:

> An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

The denial of a motion for summary judgment does not determine an action and prevent a judgment, and thus generally does not constitute a final order under R.C. 2505.02, *State ex rel. Overmeyer v. Wallinsky* (1966), 8 Ohio St. 2d 23, *Celebrezze v. Netzley* (1990), 51 Ohio St. 3d 89. Further, the trial court's use of Civ. R. 54(B) language in its order does not turn an otherwise non-final order into a final appealable order. *Noble v. Colwell* (1989), 44 Ohio St. 3d 92.

The court's order denying the motions for summary judgments of the two Cross-Appellants was not made in a special proceeding. *General Accident Insurance Co. v. Insurance Company of North America* (1989), 44 Ohio St. 3d 17. *Amato v. General Motors Corporation* (1981), 67 Ohio St. 2d 253. The court's orders were made in "a straightforward civil action," *Noble v. Colwell, supra*, 44 Ohio St. 3d at 94, and no elements of that action constitute any form of "special proceeding" by virtue of any interest involved. [14] *Celebrezze v. Netzley, supra*, 51 Ohio St. 3d at 1294.

We find that the orders of the trial court denying their respective motions for summary judgment of Cross-Appellants Eddie Slaughter and Miami Liberty Cab Co. were not final appealable orders, and we sustain the assignments of error presented by each of those parties.

V

CONCLUSION

For the reasons stated in our opinion, the decision of the trial court granting summary judgment to the Dayton Board of Education is affirmed. The decisions of the trial court finding the denial of summary judgment requested by Eddie Slaughter and Miami Liberty Cab Company to be final, appealable orders are, to that extent, reversed and vacated. The matter is remanded to the trial court for further proceedings.

WILSON, *J.* and BROGAN, *J.*, concur

Copies mailed to:

Howard P. Krisher, Esq.
Alvarene N. Owens, Esq.
Nwabueze v. Okocha, Esq.
Gregory T. Scott, Esq.
Robin Freeman, Esq.
Robert A. Burke, Esq.
John Petzold, Esq.
Honorable Robert Brown

DECISION AND ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO RE PROTECTIVE ORDER AND MOTION TO QUASH

(Filed January 12, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, etc.,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND ENTRY

(Sustaining Defendants' Motions (2) for Protective Order and Motion to Quash)

This cause is before the Court on the motion of the Defendant, Eddie Slaughter, through counsel, filed herein on January 10, 1989, seeking an order of this Court granting a protective order with respect to a deposition scheduled for January 13, 1989, and for an order quashing the subpoena duces tecum served upon that Defendant. The Court also has before it the motion of the Defendant, Dayton Board of Education, through

counsel, filed herein on January 10, 1989, seeking a protective order with respect to a deposition scheduled for January 19, 1989. Each of the motions is supported by a memorandum. Due to the imminency of the one deposition, the Court deems it appropriate and necessary to pass upon these motions without delay. The Court finds both motions well taken in their entirety.

Counsel for Plaintiffs have consistently acknowledged that the Defendant, Eddie Slaughter, is charged with a criminal offense arising out of the same facts giving rise to this litigation, and further that trial of that matter has not been completed. The Court could allow the deposition of Mr. Slaughter to proceed, but it is patent that Mr. Slaughter, on advice of counsel, will [2] decline to answer a substantial number of questions asserting his rights under the Fifth Amendment to the United Stated Constitution. For all the parties and all the lawyers involved in this matter to assemble for what would appear to be a vain endeavor would be a waste of everyone's time.

As to that same Defendant's motion to quash the subpoena duces tecum, counsel for Plaintiffs have apparently misconstrued the function of such a writ. That order to produce documents is so that the deponent may be questioned concerning those documents, and not to provide those documents to counsel prior to the deposition. If counsel for Plaintiffs want to examine documents prior to the deposition of Mr. Slaughter, counsel's attention is directed to Civil Rule 34.

With respect to the motion for protective order presented by the Dayton Board of Education, the Court is again aware of the tangential litigation with respect to what, if any, insurance carriers are required to provide a defense and/or indemnity. While this Court is not

presently aware of the schedule with relation to those determinations, it is apparent that those issues will not be resolved prior to January 19, 1989. For that reason, the Court finds the motion for protective order well taken. The sustaining of this motion, however, should not be construed as an indefinite stay of these proceedings. Inasmuch as this matter cannot proceed until Mr. Slaughter is deposed, and that cannot occur until after the disposition of the criminal proceeding, any efforts to depose the Dayton Board of Education should be delayed [3] until the termination of Mr. Slaughter's criminal proceeding. Meanwhile, counsel for the Defendants is directed to make the Court aware of the status of these separate proceedings so that the Court may be in an informed position with respect to any future endeavors to depose the Board of Education.

It is, therefore, ORDERED that the motions of the Defendant, Slaughter, filed herein on January 10, 1989, and the motion of the Defendant, Dayton Board of Education, filed herein on January 10, 1989, be, and the same are hereby SUSTAINED.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ ROBERT M. BROWN
Judge

DECISION AND ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO SUSTAINING MOTION TO AMEND COMPLAINT

(Filed January 12, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, etc.,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND ENTRY

(Sustaining Motion to Amend Complaint)

This cause is before the Court on the motion of the Plaintiff through counsel, filed herein on December 22, 1988, seeking an order of this Court granting them leave to file a First Amended Complaint. A copy of the proposed First Amended Complaint is attached to the motion. The motion is supported by a memorandum. In response to this motion, the Defendants, Miami Liberty Cab Co. and Eddie Slaughter, through counsel, filed a memorandum in opposition. This motion is ready for

decision pursuant to the entry of this Court served and journalized on December 23, 1988. The Court finds the motion well taken.

Civil Rule 15(A) requires the Court to freely give leave to file an amended pleading so that all issues raised by the factual situation giving rise to litigation may be resolved. The Court notes that this action is set for trial on April 24, 1989, and therefore still leaves sufficient time for counsel for Defendants to meet the issues raised by an amended complaint.

The opposition raised to the filing of this amended complaint is primarily founded on the claims of statute of limitations [2] and real party in interest. While these may be very real issues, there are appropriate vehicles by which those issues may be raised. They are not, however, grounds for denying leave to amend the complaint.

It is, therefore, ORDERED that the motion of the Plaintiffs filed herein on December 22, 1988, be, and the same is hereby, SUSTAINED.

It is further ORDERED that the Clerk of Courts detach the amended complaint from the original motion and file-stamp the First Amended Complaint forthwith. Counsel for Defendant are urged to respond to the Amended Complaint as expeditiously as possible.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ ROBERT M. BROWN
Judge

DECISION AND PARTIAL SUMMARY JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO

(Filed November 8, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

MARY JONES, et al.,
Plaintiffs,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND PARTIAL SUMMARY JUDGMENT ENTRY

(Ruling on Summary Judgment Motions filed
August 15, 1989, September 8, 1989,
and September 15, 1989)

This Court presently has pending before it three summary judgment motions.

On August 15, 1989, the Defendant, Dayton Board of Education (hereinafter "DBOE"), through counsel, filed a motion for summary judgment. The motion is supported by a memorandum and exhibit. In response to this motion, Plaintiffs (hereinafter "Jones"), through counsel, filed a memorandum in opposition on September 22, 1989. Both parties rely upon affidavits.

On September 8, 1989, the Defendant Miami Liberty Cab Company (hereinafter "MLCC"), through counsel, filed a motion for summary judgment. The motion is supported by memorandum and an affidavit. In response to this motion, Jones, through counsel, filed a Memorandum in Opposition on September 22, 1989. Defendant Eddie Slaughter (hereinafter "Slaughter"), through counsel, also filed a Memorandum in Opposition to MLCC's motion on September 29, 1989. All parties rely upon affidavits and depositions.

On September 15, 1989, Jones, through counsel, filed an [2] amended motion for summary judgment. The motion is supported by memorandum, affidavits, and depositions. In response to this motion, DBOE, through counsel, filed a memorandum in opposition on September 29, 1989; MLCC, through counsel, filed a memorandum in opposition on October 2, 1989, and; Slaughter, through counsel, filed a memorandum in opposition on September 29, 1989. All parties rely upon numerous depositions and affidavits.

In reviewing all of the above motions for summary judgment, the Court has considered the motion and memoranda of counsel, the pleadings, the affidavits, and depositions.

The three motions are now ready for decision pursuant to the entry of this Court served and journalized on September 18, 1989. The Court finds DBOE's Motion for Summary Judgment well taken. The Court finds MLCC's Motion for Summary Judgment not well taken on any of the issues. Finally, the Court finds Jones' Motion for Summary Judgment not well taken on any of the issues.

The appropriateness of rendering a motion for summary judgment is determined by the tripartite demonstration: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion is adverse to the party against whom the motion for summary judgment is made . . ." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66.

As to DBOE's potential liability, it is necessary to examine the mandate of *R.C. Section 2744,* which covers tort liability for political subdivisions. It is uncontradicted that [3] DBOE is a political subdivision and thus, no genuine issue of material fact exists. *R.C. Section 2744.02* states that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act of its own or its employees in performing a governmental or proprietary function.

Thus, since DBOE is a political subdivision and was performing a governmental function at the time of alleged incident—providing a system of public education *R.C. Section 2744.01(C)(2)(c)*—it is immune from liability if its actions did not fall within any of the exceptions listed in *R.C. 2744.02(B)(1)-(5).* DBOE does not fall within any of the exceptions because Slaughter was not an "employee" of DBOE. DBOE exercised no control over Slaughter, which is a key determination to be made in determining whether the relationship is employer-employee. *Marshall v. Aaron* (1984), 15 Ohio St. 3d 48, 49. Thus, since there is no question as to any material fact and as a matter of law DBOE is entitled to immunity under R.C. Section 2744.

MLCC raises two issues in its motion for summary judgment. First, that MLCC is not liable because it was unaware that Slaughter was unfit or incompetent. The Court is satisfied Jones has presented sufficient factual material to demonstrate that there is a genuine issue of material fact on this issue. Secondly, MLCC raises the issue that Slaughter was not an employee of MLCC and therefore, it assumes no liability for Slaughter's alleged negligence. The Court is satisfied that Slaughter has presented sufficient factual material to [4] demonstrate that a genuine issue of material exists as to the interpretation of the contract between Slaughter and MLCC regarding liability. Thus, MLCC's motion for summary judgment will not be granted on either issue.

A number of issues have been raised in Jones' Amended motion for summary judgment. First, Jones states that Slaughter sexually molested Karen Jones based on the doctrine of res judicata. Slaughter has presented sufficient factual to demonstrate that issues of material fact exist and that the doctrine of res judicata does not apply here. *Hever v. Huwe* (1924), 2 Oh. L. Abs. 475. Also, MLCC has presented sufficient factual material to demonstrate that there exists a question of fact as to liability.

Secondly, Jones raises the issue that DBOE failed to comply with *20 U.S.C. Section 1400.* By granting DBOE's Motion for Summary Judgment, it is dispositive of all issues against it. This also includes the following issues raised by Jones: violation of *42 U.S.C. Section 1983,* deprivation of 8th and 14th Amendment Rights, liberty interest—substantive due process deprivation, and DBOE's indifference and/or negligence towards Jones.

Next, Jones believes that the remaining defendants (Slaughter and MLCC) acted under color of state law, and thus she has a *42 U.S.C. Section 1983* claim. Essentially, Jones is arguing that Defendants breached a duty of care. However, *Doe "A" v. Special Sch. Dist. of St. Louis County,* 637 F. Supp. 1138, 1143 (E.D. Mo. 1986), states that, "[s]ection 1983 does not provide a remedy for violations of duties of care arising [5] out of tort law." Thus summary judgment will not be granted on this issue.

Summary Judgment must also be denied on the issue that the Defendants violated Karen Jones' 8th Amendment Rights. The 8th Amendment was designed to protect individuals convicted of crimes. *Ingraham v. Wright,* (1977) 430 U.S. 651, 664. Since Karen Jones has not been convicted of any crimes pertaining to this litigation this issue must be denied.

Jones also raises the issues that Defendants have violated her substantive due process rights and liberty interests of the 14th Amendment. The basis of these deprivations is again, duty of care. The Court is satisfied that Defendants have presented sufficient factual material to show that there is a genuine issue of material fact concerning any issue raising duty of care.

Finally, Jones raises the issue of right to privacy. However, none of the allegations raised in Jones' second amended complaint can be construed to raise this issue. *Fancher v. Fancher* (1982), 8 Ohio App. 3d 79.

It is therefore, ORDERED that the amended motion of Plaintiffs, Mary Jones, et al., for summary judgment filed herein on September 15, 1989, be, and the same is hereby OVERRULED.

It is further ORDERED that the motion of Defendant, MLCC, for summary judgment filed herein on September 8, 1989, be, and the same is hereby OVERRULED.

Finally, it is ORDERED that the motion of Defendant, DBOE, for summary judgment, filed herein on August 15, 1989, be, and [6] the same is hereby SUSTAINED.

It is ORDERED AND ADJUDGED that the Second Amended Complaint be, and the same is hereby, DISMISSED, as to the Defendant Dayton Board of Education, with prejudice. The Court determines that there is no just reason for delay in entering this judgment.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

ROBERT M. BROWN, *Judge*

ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO

(Filed March 16, 1989)

Case No. 87-3339

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, et al.,
Plaintiffs,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

ENTRY

Pursuant to the Decision and Entry of this Court served and journalized on February 3, 1989, the Plaintiffs, through counsel, tendered a Second Amended Complaint to the Court on February 10, 1989. The Court has carefully reviewed this document and concludes that there has been little, if any, compliance with the Decision and Entry of this Court of February 3, 1989. While it certainly is not the province of the Court to draft pleadings for parties, be they plaintiff or defendant, in the interests of justice and of judicial economy, the Court has carefully examined and excised that material in the tendered Second Amended Complaint which does not conform to the Civil Rules. A copy of this edited document is enclosed with this Decision and Entry.

If counsel for Plaintiffs desires to pursue this litigation any further, they are instructed to prepare a Second Amended Complaint in accordance with the edited copy enclosed, provided it is tendered to the Court within 14 days after this Decision and Entry is served and journalized. If counsel declines to follow the instructions of the Court, the Court will consider the dismissal of this action for want of prosecution.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ROBERT M. BROWN, *Judge*

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and Guardian on behalf of Karen Jones, a minor and an incompetent
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES, as Next Friend and Guardian on behalf of Sally Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

and

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406

Plaintiffs

vs.

DAYTON BOARD OF EDUCATION
348 W. First Street
Dayton, Ohio 45402

MIAMI LIBERTY CAB CO.
1406 Third National Building
Dayton, Ohio 45402

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418

Defendants

CASE NO. 87-3339
(Judge Brown)

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Now comes the Plaintiffs, Mary Jones, and Karen Jones and Sally Jones, minors, by and through their next friend, mother and guardian, Mary Jones, and for their Second Amended Complaint aver as follows:

Alvarine K. Owens Co. L.P.A.

1. Plaintiff Karen Jones is a minor, blind, emotionally disturbed, mentally retarded, handicapped and an incompetent individual, ~~pursuant to state and federal law~~, residing in Dayton, Ohio.

2. Plaintiff Sally Jones is a minor, and is the daughter of Plaintiff Karen Jones.

3. Plaintiff Mary Jones is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

4. Defendant Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), ~~and vested with the statutory duty pursuant to the provisions of Title 33 of Ohio Revised Code~~.

5. Defendant Miami-Liberty Cab Co. is at all times relevant hereto, a taxicab company and/or a common carrier, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

6. Defendant Eddie Slaughter is at all times relevant hereto, a resident of the City of Dayton, and employed as a cab driver by, or as an agent of Defendant Miami-Liberty Cab Co.

~~7. At all times relevant hereto, all of the Defendants acted under color of state law.~~

8. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff Karen Jones.

9. DPS evaluated and designed Plaintniff Karen Jones' educational plan and placed her in the Ohio State School for the Blind, ~~pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1400 et seq. and pursuant to state law~~.

10. ~~In compliance with the statutory duty~~, Defendant DBOE arranged and employed Defendant Miami-Liberty Cab Co. for the transportation of Plaintiff Karen Jones to the Ohio State School for the Blind by contract. A true and accurate copy of the contract is in the possession of Defendants DBOE and Miami-Liberty Cab Co.

~~11. Defendant DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.~~

~~12. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff Karen Jones to Defendant Miami Liberty Cab Co.~~

~~13. Over a period of several years, Defendant Miami Liberty Cab Co. transported Plaintiff Karen Jones from Dayton, Ohio, to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.~~

~~14. Defendant Miami Liberty Cab Co. received over five thousand ($5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.~~

15. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter ~~sexually molested and maliciously and unlawfully assaulted and~~

ALVARDO M. OWENS CO. L.P.A.

~~committed acts of gross sexual imposition upon Plaintiff Karen Jones by~~ unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

~~46. Defendant Slaughter's conduct was outrageous, malicious, reckless, wanton and oppressive.~~

17. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

~~48. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.~~

19. As a direct and proximate result of Defendant Slaughter's ~~unlawful~~ sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

20. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Plaintiff Sally Jones.

~~21. Defendant Slaughter is the natural and biological father of Plaintiff Sally Jones.~~

~~22. Defendants Miami Liberty Cab Co. and DOES were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.~~

~~23. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.~~

ALVAREZ, M. OWENS Co. L.P.A.

24. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Plaintiff Sally Jones' child care, necessities, medical, educational and recreational expenses, ~~until Plaintiff Sally Jones reaches majority~~.

~~25. The Defendants maliciously, recklessly, and wantonly interfered with and disrupted Plaintiff Karen Jones' education. This punishment is cruel and unusual, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.~~

26. As a direct and proximate result of Defendants' ~~reckless, wanton, willful, malicious and oppressive~~ acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

27. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

~~28. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.~~

~~29. Defendants DBOE and Miami Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violence free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control~~

ALVAREZ N. OVIEDO Co. L.P.A.

~~the practices described in paragraphs 1 through 28 of this Second Amended Complaint.~~

~~30. Defendants DBOE and Miami Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.~~

~~31. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPC, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami Liberty Cab Co. Defendants DBOE and Miami Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.~~

~~32. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiffs.~~

~~33. The denial of adequate education to Plaintiff Karen Jones deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the EHA, causing Plaintiffs irreparable injury.~~

~~34. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under the Eighth and Fourteenth Amendments to the United States Constitution and the EHA, causing them irreparable injury.~~

ALVARENE R. OWENS CO. L.P.A.

~~95. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anxiety, indignity, terror, and other damages to be adduced at trial for which there is no adequate remedy under State law.~~

~~FIRST CLAIM~~

~~96. Plaintiffs reallege and incorporate by reference paragraphs 1 through 95 of the Second Amended Complaint as if fully rewritten herein.~~

~~97. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.~~

~~SECOND CLAIM~~

~~98. Plaintiffs reallege and incorporate by reference paragraphs 1 through 97 of the Second Amended Complaint as if fully rewritten herein.~~

~~99. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.~~

~~THIRD CLAIM~~

~~100. Plaintiffs reallege and incorporate by reference paragraphs 1 through 99 of the Second Amended Complaint as if fully rewritten herein.~~

~~101. Defendants DROC and Miami Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the~~

ALVAREZ M. OWENS Co. L.P.A.

patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

42. Plaintiffs reallege and incorporate by reference paragraphs 1 through 41 of the Second Amended Complaint as if fully rewritten herein.

43. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43 of the Second Amended Complaint as if fully rewritten herein.

45. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

46. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

ALVARADO M. OVIEDO CO. L.P.A.

~~SIXTH CLAIM~~

~~47. Plaintiffs reallege and incorporate by reference paragraphs 1 through 46 of the Second Amended Complaint as if fully rewritten herein.~~

~~48. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.~~

~~SEVENTH CLAIM~~

~~49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 48 of the Second Amended Complaint as if fully rewritten herein.~~

~~50. As a direct and proximate result of Defendants' actions, Plaintiff Kelly Jones, has suffered a loss of her mother, Karen Jones', society and companionship.~~

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award compensatory damages against Defendants joint and severally;

~~Award Plaintiffs compensatory damages against Defendants~~ in the amount of $1,520,000.00 ~~as per prayer for relief No. 1~~;

~~2.~~ Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 ~~as per prayer for relief No. 1~~, reasonable attorney fees and costs.

ALVARINO & OLIVER CO., L.P.A.

~~4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;~~

~~5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988 and the EHA as per prayer for relief No. 1;~~

✓. Demand for a jury trial pursuant to Civil Rule 38; and,

✓. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

ALVARENE M. OWENS
ALVARENE M. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO.,L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

Endorsement

PLAINTIFF'S FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Case No. 87-3339

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES,
Mother and Guardian
on behalf of
KAREN JONES, an incompetent,
2918 Jerome,
Dayton, Ohio 45408,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
JOHN LENEHAN,
Legal Counsel,
348 W. First Street,
Dayton, Ohio 45402,

MIAMI LIBERTY CAB CO.,
FRANK M. ROOT,
Statutory Agent,
1406 Third National Building,
Dayton, Ohio 45402

and

EDDIE SLAUGHTER,
4821 Liberty Road,
Dayton, Ohio 45418,
Defendants.

Now comes the Plaintiffs, Mary Jones and Karen Jones, a minor, by and through her next friend, mother and guardian, Mary Jones, and for her First Amended Complaint aver as follows:

1. Plaintiff, Karen Jones, is a handicapped individual pursuant to state and federal law, an incompetent and a minor residing in Dayton, Ohio.

2. Plaintiff, Mary Jones, is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

3. Defendant, Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), pursuant to the provisions of Title 33 of Ohio Revised Code.

4. Defendant, Miami-Liberty Cab Co., is at all times relevant hereto, a taxicab company, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

5. Defendant, Eddie Slaughter, is at all times relevant hereto, a resident of the City of Dayton, and an employee or agent of Defendant, Miami-Liberty Cab Co.

6. At all times relevant hereto, all of the Defendants acted under color of state law.

7. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff, Karen Jones.

8. Defendant DBOE has a statutory duty to provide education to students within its jurisdiction, including but not limited to, providing transportation necessary for the education of students.

9. Plaintiff, Karen Jones, was identified by the DPS as an emotionally disturbed child by the time she entered the school system.

10. DPS also identified Plaintiff, Karen Jones, as a mentally retarded and blind.

11. Based on evaluations and tests administered by the DPS, Plaintiff, Karen Jones, was placed in an educational institution for the blind and for emotionally disturbed children consistent with the Defendant DBOE's statutory responsibility.

12. Plaintiff, Karen Jones, is entitled to instruction from the DPS pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1412(1), 1413(a), and pursuant to state law.

13. The EHA requires DPS to ensure a "free appropriate education" for all disabled children within its jurisdiction.

14. Defendant DBOE contracted the Ohio State School for the Blind, Columbus, Ohio for placement of Karen Jones.

15. DPS designed Plaintiff Karen Jones' educational plan.

16. Subsequently, Defendant DBOE entered into an agreement with the Ohio State School for the Blind consistent with its education plan for Plaintiff, Karen Jones.

17. Transportation is essential for the education of Plaintiff, Karen Jones, in the Ohio State School for the Blind.

18. In compliance with its statutory duty, Defendant DBOE arranged for the transportation of Plaintiff, Karen Jones, to the Ohio State School for the Blind, with Defendant, Miami-Liberty Cab Co.

19. Defendant DBOE employed Defendant Miami Liberty Cab Co. to transport its students, including but not limited to blind and retarded students, such as Plaintiff, Karen Jones, to schools.

20. At all times relevant hereto, Defendant Slaughter was acting as an employee or agent of the Defendant Miami Liberty Cab Co.

21. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiff, that it is a taxicab company or a common carrier, engaged in the business of transportation of persons or property for compensation.

22. Defendant DBOE authorized Defendant Miami-Liberty Cab Co. to transport Plaintiff, Karen Jones.

23. Defendant, DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.

24. Defendant Miami-Liberty Cab Co. voluntarily assumed these obligations by contract.

25. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff, Karen Jones, to Defendant Miami-Liberty Cab Co.

26. Over a perod of several years, Defendant Miami-Liberty Cab Co. transported Plaintiff, Karen Jones, from Dayton, Ohio to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.

27. Defendant Miami-Liberty Cab Co. received over five thousand (5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.

28. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiffs, that Defendant Slaughter was acting as its employee or agent.

29. Plaintiffs and Defendant DBOE reasonably believed that Defendant Slaughter was acting as an employee or agent of the Defendant Miami-Liberty Cab Co.

30. Defendant, DBOE and Plaintiffs relied on the aforestated representations to their own detriment.

31. On November 16, 1986, Plaintiff, Karen Jones, was transported in Defendant Miami-Liberty Cab Co.'s vehicles from Dayton, Ohio to Columbus, Ohio.

32. Defendant DBOE paid for the transportation of Plaintiff, Karen Jones, by Defendant Miami-Liberty Cab Co. to the Ohio State School for the Blind.

33. Defendants Miami-Liberty Cab Co. and DBOE were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.

34. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.

35. On November 16, 1986, Plaintiff Karen Jones was transported in Defendant Miami-Liberty Cab Co.'s vehicle.

36. Defendant Slaughter was the driver of Defendant Miami-Liberty Cab Co.'s vehicle that transported Plaintiff Karen Jones.

37. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter sexually molested and maliciously and unlawfully assaulted and committed acts of gross sexual imposition upon Plaintiff Karen Jones by unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

38. Defendant Slaughter sexually molested and abused Plaintiff Karen Jones.

39. Defendant Slaughter's conduct was outrageous, malicious, wanton and oppressive.

40. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

41. As a direct and proximate result of the sexual assault and abuse of Plaintiff Karen Jones, Plaintiffs have suffered and continue to suffer extreme pain, physical harm, shock, mental anguish, and emotional distress.

42. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.

43. As a direct and proximate result of Defendant Slaughter's unlawful sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

44. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Sally Jones.

45. Defendant Slaughter is the natural and biological father of Sally Jones.

46. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Sally Jones' child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority.

47. The Defendants maliciously and wantonly interfered and disrupted Plaintiff Karen Jones' education. This punishment is cruel, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.

48. As a direct and proximate result of Defendants' reckless, wanton, willful, malicious and oppressive acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

49. Plaintiffs have suffered severe mental and emotional distress such that Plaintiff Karen Jones is afraid to attend school.

50. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

51. Defendant Miami-Liberty Cab Co. undertook to provide transporation for Plaintiff Karen Jones.

52. Defendant Miami-Liberty Cab Co. had a duty to exercise reasonable care for the safety of Plaintiff Karen Jones.

53. Defendant Miami-Liberty Cab Co. breached its duty of care to Plaintiff Karen Jones by hiring or retaining unqualified or irresponsible employees and personnel; by failing to establish or to enforce policies

and procedures necessary to insure the safety of Plaintiff Karen Jones by failing to monitor the quality of care being provided to its passengers.

54. As a direct and proximate result of Defendant Miami-Liberty Cab Co.'s breach of its duty of care, Plaintiffs were injured.

55. Defendant DBOE undertook to provide transportation for Plaintiff Karen Jones.

56. Defendant DBOE had a duty to exercise due skill and care in selecting, hiring, firing and retaining responsible employees and services, but failed to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones and failed to monitor the quality of care being provided to its students.

57. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.

58. As a direct and proximate result of Defendant DBOE's breach of its duty of care, Plaintiffs were injured.

59. Defendants DBOE and Miami-Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violent-free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control the practices described in paragraphs 1 through 8 of this First Amended Complaint.

60. Defendants DBOE and Miami-Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.

61. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPS, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami-Liberty Cab Co. Defendants DBOE and Miami-Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.

62. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiff.

63. The denial of adequate education to Plaintiff Karen Jones, deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing Plaintiff's irreparable injury.

64. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing them irreparable injury pursuant to 42 U.S.C. Section 1983.

65. As a direct and proximate result of Defendants' actions, Plaintiff have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anziety, indignity, terror, and other damages to be adduced at trial.

FIRST CLAIM

66. Plaintiffs reallege and incorporate by reference paragraphs 1 through 65 of the First Amended Complaint as if fully rewritten herein.

67. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.

SECOND CLAIM

68. Plaintiffs reallege and incorporate by reference paragraphs 1 through 67 of the First Amended Complaint as if fully rewritten herein.

69. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.

THIRD CLAIM

70. Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 of the First Amended Complaint as if fully rewritten herein.

71. Defendants DBOE and Miami-Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

72. Plaintiffs reallege and incorporate by reference paragraphs 1 through 71 of the First Amended Complaint as if fully rewritten herein.

73. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

74. Plaintiffs reallege and incorporate by reference paragraphs 1 through 73 of the First Amended Complaint as if fully rewritten herein.

75. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

76. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

SIXTH CLAIM

77. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of the First Amended Complaint as if fully rewritten herein.

78. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award damages against Defendants joint and severally;

2. Award Plaintiffs compensatory damages against Defendants in the amount of $1,520,000.00 as per prayer for relief No. 1;

3. Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 as per prayer for relief No. 1;

4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;

5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. Section 1988 as per prayer for relief No. 1;

6. Demand for a jury trial pursuant to Civil Rule 38; and,

7. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE M. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUZZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

(2)

No. 90-1982

FILED
JUL 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf of KAREN JONES, an Incompetent, and MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI LIBERTY CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT DAYTON BOARD OF EDUCATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOWARD P. KRISHER
Counsel of Record
BIESER, GREER & LANDIS, of Counsel
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402-1908
(513) 223-3277
Attorneys for Respondent
Dayton Board of Education

Of Counsel:
JOHN F. LENEHAN
DWIGHT A. WASHINGTON
348 West First Street
Dayton, Ohio 45402
(513) 461-3091

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

1. Whether any constitutionally protected interest is jeopardized where a state court judge properly exercises his discretion in refusing to permit unlimited amendments to a complaint filed in state court where counsel fail to comply with well recognized rules of pleading and reasonable prior orders of the court and where counsel fail to exercise other options available in both state and federal court to present their federal claims.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

I. STATEMENT OF CASE AND FACTS 1

II. SUMMARY OF ARGUMENT 5

III. ARGUMENT 6

IV. PETITIONERS' AUTHORITY DISTINGUISHED 11

V. CONCLUSION 13

APPENDIX:

Decision and Entry of February 3, 1989 ..... A1

ExParte Motion Non [sic] Pro Tunc A5

Plaintiffs' First Amended Complaint A11

Plaintiffs' Second Motion to Amend Its First Amended Complaint to Plaintiff's Second Amended Complaint A23

Plaintiffs' Tender of Second Amended Complaint A39

Plaintiffs' Second Amended Complaint A41

Second Amended Complaint and Demand for Jury Trial A51

Constitutional and Statutory Provisions A55

TABLE OF AUTHORITIES

Cases

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 988 (1989) 11

Felder v. Casey, 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988) 11

Firchau v. Diamond National Corp., 345 F.2d 269 (9th Cir. 1965) 9

Foman v. V. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) 9

Martinez v. California, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980) 8

Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) 11

Paradini v. National Tea Co., 62 F.R.D. 503 (D.C. Pa. 1974) 9

Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973) 9

Schwarz v. Ohio State University, 31 Ohio St. 3d 267, 510 N.E.2d 808 (1987) 8

Spampinato v. M. Berger & Co., 176 F. Supp. 149 (E.D., N.Y. 1958) 9

Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989) (*cert. den.* 107 L. Ed. 2d 835, 110 S.Ct. 840, 1990) 11

Statutes

42 U.S.C. 1983 3,5

§2305.19 Ohio Revised Code 8

§2744.01, *et seq.*, Ohio Revised Code 3,4,5,10

Rules

Federal Rules of Civil Procedure Rule 8(A) 7

Federal Rules of Civil Procedure Rule 8(E)(1) 7

Federal Rules of Civil Procedure Rule 15(A) 8

Ohio Rules of Civil Procedure Rule 8(A) 6,9

Ohio Rules of Civil Procedure Rule 8(E)(1) 6,7

Ohio Rules of Civil Procedure Rule 15(A) 8

Ohio Rules of Civil Procedure Rule 41 8

No. 90-1982

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf of
KAREN JONES, an Incompetent, and
MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI
LIBERTY CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT DAYTON BOARD OF EDUCATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF CASE AND FACTS

On October 22, 1987, Petitioner, Mary Jones, as mother and guardian of Karen Jones, filed her complaint in the Montgomery County, Ohio Common Pleas Court against the Dayton Board of Education ("Dayton Board"), Miami Liberty Cab Company ("Miami Liberty"), and Eddie Slaughter. The complaint alleged that Karen Jones, a blind and multi-handicapped student in the Dayton Public School System, had been sexually assaulted by Eddie Slaughter, a taxicab driver, under contract with Miami Liberty, while he was transporting Karen Jones to the Ohio State School for the Blind in Columbus, Ohio, and that the Dayton Board was negligent in utilizing Miami Liberty to provide such transportation. The complaint further alleged that, as a result of the assault, Karen Jones was impregnated and gave birth to a child.

Many, if not most, of the facts concerning the incident which gave rise to this litigation are in dispute between what is stated in the Petitioners' Petition for Writ of Certiorari and Respondent's position as to the facts. For example, Respondent does not agree that (1) Karen Jones was profoundly retarded, (2) Karen Jones was under the Dayton Board's custody, control and supervision when the incident occurred, (3) the Dayton Board placed Karen Jones in the taxicab, (4) the Dayton Board engaged in any practice, custom and policy of reckless or deliberate indifference or gross negligence in regard to Karen Jones' Constitutional rights, (5) Mary Jones raised any issues concerning her daughter's safety while being transported by taxicab to the Ohio State School for the Blind, (6) the Dayton Board violated any statute in connection with the transportation of Karen Jones, (7) the Dayton Board directed the seating of

Karen Jones in the taxicab on the date of the incident, and (8) the Dayton Board had any knowledge prior to the event that the driver was a felon, alcoholic or a substance abuser. While these matters are contested, the resolution of them is not necessary in connection with the resolution of this matter by the trial court as upheld by the appellate court or for this Court to determine that this case is not entitled to a writ of certiorari.

On December 22, 1988, after the action had been pending for approximately 14 months, the Petitioners moved the trial court for leave to file an amended complaint. Leave was granted by the trial court, and the first amended complaint was filed on January 12, 1989, and in 78 paragraphs set forth six claims for relief, including claims based upon theories of violation of 42 U.S.C. §1983, assault, negligence, invasion of privacy, infliction of severe emotional distress, and loss of society and companionship. (See Petitioner's Appendix, A38.)

On January 25, 1989, the Petitioners filed a motion entitled "Exparte Motion Non [sic] Pro Tunc," etc. (See App. A5) requesting leave to amend the first amended complaint and to add new parties plaintiff. The trial court denied this motion on January 31, 1989. On February 1, 1989, the Petitioners filed another motion requesting leave to amend the First Amended Complaint. (See App. A23.)

On February 3, 1989, the trial court issued a Decision and Entry deferring decision on the motion for leave to file the second amended complaint and directed counsel for Petitioners to review their proposed amendment in light of Rules 8(A) and 8(E)(1) of the Ohio Rules of Civil Procedure. These rules state that a claim for relief shall contain "... a short and plain statement of the claim ...." and that a pleading shall be "...

simple, concise and direct . . . ." The trial court noted that the proposed second amended complaint is "replete with superfluous and unnecessary allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend." (See App. A1).

On February 10, 1989, Petitioner submitted a revised proposed second amended complaint to the trial court. (See App. A39.) On March 16, 1989, the trial court issued its Entry, which stated that after review of the revised proposed second amended complaint, ". . . there has been little, if any, compliance with the decision and entry of this Court of February 3, 1989." (Petitioner's App. A26.) The court then attached its own edited version of the proposed second amended complaint and instructed Petitioners to prepare a second amended complaint in conformity to the court's instruction.

The Petitioners elected to follow the trial court's instructions, and on March 29, 1989, filed a second amended complaint. (See App. A51.) The second amended complaint as filed by the Petitioners did not raise a claim based upon 42 U.S.C. §1983 or any other federal civil rights statute.

On August 15, 1989, the Dayton Board filed a motion for summary judgment based upon the immunity from tort liability provided to political subdivisions by §2744.01, *et seq.* of the Ohio Revised Code, and on November 8, 1989, the trial court granted this motion.

Petitioners appealed the trial court's grant of summary judgment in favor of the Dayton Board to the Ohio Court of Appeals, Second Appellate District. The Appeals Court in its opinion of October 3, 1990, found that the trial court had not abused its discretion in connection with the granting of leave to file the Second

Amended Complaint. The Appeals Court upheld the grant of summary judgment in favor of the Dayton Board based upon the immunity provisions of §2744.01, *et seq.* of the Ohio Revised Code, noting that Petitioner's argument concerning federal civil rights violations was misplaced, as the second amended complaint, as filed by the Petitioner, contained only claims based upon common law tort theories and contained no claims brought under Federal law.

In its entry of March 27, 1991, the Ohio Supreme Court dismissed the appeal of Petitioner to it, and the Petitioners subsequently filed the instant petition for Writ of Certiorari to this Court.

II. SUMMARY OF ARGUMENT

The decision below properly dealt with an appropriate exercise of discretion by the trial court in permitting Petitioners (plaintiffs below) to file a second amended complaint, which did not include a claim for relief based upon 42 U.S.C. §1983 and the subsequent granting of summary judgment in favor of the Dayton Board of Education on the negligence claim which was raised in the Second Amended Complaint because of the immunity from tort liability for political subdivisions provided by Ohio Revised Code §2744.01, *et seq.* There is no issue of law present which justifies the grant of a writ of certiorari in this case.

III. ARGUMENT

This case involves a procedural quagmire created by counsel for Petitioners and has nothing to do with actions by state courts to limit Petitioners' ability to assert claims based on alleged violations of civil rights under federal law. The second amended complaint filed by the Petitioners contained no claims based on federal civil rights violations, but contained only common law claims of negligence. (See App. A51.)

The Petitioners' original complaint sounded solely in common law negligence. The Petitioners' first amended complaint added several additional claims for relief. The Petitioners next attempted to amend the first amended complaint to add new parties plaintiff. The trial court denied this motion, and the Petitioners moved for leave to file a second amended complaint. The trial court reviewed the tendered amendment and observed that it did not comply with Rules 8(A) and 8(E)(1) of the Ohio Rules of Civil Procedure concerning a short and plain statement of the claim and that the averments in the pleadings be simple, concise and direct. The trial court did not deny leave to amend, but deferred decision to give Petitioners an opportunity to file another amended pleading which was in conformity with the Ohio Civil Rules.

The Petitioners next tendered a revision of their second amended complaint, which still did not comply with Rules 8(A) and 8(E)(1) of the Ohio Rules of Civil Procedure. The trial court still did not deny leave to amend, but instead gave Petitioners another opportunity to revise their second amended complaint to conform to the Ohio Rules of Civil Procedure and attached an edited version of the amended complaint as guidance to the

Petitioners. The Petitioners then filed their second amended complaint, which did not include a civil rights claim.

The Petitioners now argue that these actions constitute the placement of burdens on the Petitioners in bringing a civil rights claim in the Ohio courts that would not have existed in the federal courts. This is simply not the case. 8(A) and 8(E)(1) of the Ohio Rules of Civil Procedure are substantially the same as 8(A) and 8(E)(1) of the Federal Rules of Civil Procedure, except that Ohio does not require the pleading to include a statement as to jurisdiction. The concept that pleadings should contain a short and plain statement of the claim are the same in the Ohio judicial system as in the Federal judicial system. Thus, there simply is no additional burden found in this case that was placed uopn the Petitioners that would not have existed had the Petitioners been in Federal court.

Petitioners could have initially filed their complaint in conformance with the Ohio Rules of Civil Procedure and raised their civil rights claims. When they requested leave to file their second amended complaint, Petitioners had three separate opportunities to file an amended complaint in compliance with the Ohio Civil Rules (initially with their motion, then in their first revision of their second amended complaint, and at the time they submitted their second amended complaint as actually filed) which could have raised their civil rights claims and complied with Rule 8. The Petitioners instead chose to file their second amended complaint which did not include a civil rights claim.

Petitioners at the time of and after filing their second amended complaint, if they were not satisfied with the form of their pleading, had alternatives

available to them. They could have, but did not, file for leave of court to file another amended complaint which would have raised their civil rights claim. They could have, but did not, voluntarily dismissed their complaint and refiled the action with a properly drafted complaint within one year of the voluntary dismissal. Rule 41 of the Ohio Rules of Civil Procedure permits a party to voluntarily dismiss without leave of court, and §2305.19 of the Ohio Revised Code permits a complaint that has been dismissed otherwise than on the merits to be refiled within one year of the voluntary dismissal. They could have, but did not, file a separate action in the state court to prosecute their civil rights claim. *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S.Ct. 553 (1980); *Schwarz v. Ohio State University*, 31 Ohio St. 3d 267, 510 N.E.2d 808 (1987). And, of course, they could have, but did not, file a separate action in the United States District Court for the Southern District of Ohio to prosecute their cause of action for alleged deprivation of civil rights.

The Petitioners, instead of following any of these alternatives, chose to file their second amended complaint, which did not include their civil rights claims. Thus, the Ohio judicial system did not place any additional burdens on Petitioners (indeed, in regard to the ability to voluntarily dismiss without court approval and to refile, the state system is more liberal than the federal system). The Petitioners' argument in this regard simply lacks merit.

The trial court under Rule 15(A) of the Ohio Rules of Civil Procedure has discretion in granting leave to amend. Again, this rule is substantially similar to Rule 15(A) of the Federal Rules of Civil Procedure. Where the pleading is tendered timely and no apparent or disclosed

reason such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by prior amendments, undue prejudice or futility of the amendment exist, leave to amend should be freely granted. *Foman v. V. Davis,* 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), *Peterson v. Teodosio,* 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973).

However, in the instant case, there were significant reasons expressed by the trial court in not automatically granting leave to file the second amended complaint. The trial court stated in its Decision and Entry of February 3, 1989, that the proposed amendment did not conform to the requirements of short, plain statements and contained superfluous and unnecessary allegations, conclusions of law, and was verbose to the point of being difficult to comprehend. The court in granting Petitioners the opportunity to file a revised amended complaint, clearly stated "If the pleading is in proper form, leave to file it will be promptly granted." (See App. A1.) The reasoning of the trial court in this regard was reviewed by the Ohio Court of Appeals for the Second District and was found not to be an abuse of discretion. It is not unique for a court to condition leave to file an amended complaint upon compliance with conditions. See, *Firchau v. Diamond National Corp.,* 345 F.2d 269 (9th Cir. 1965) (conditioning amendment upon plaintiff's compensating defendants for the party's failure to file an adequate pleading in the first instance); *Parandini v. National Tea Co.,* 62 F.R.D. 503 (D.C. Pa. 1974) (conditioning amendment to add conspiracy to violate civil rights claim upon waiving relation back for statute of limitation purposes); *Spampinato v. M. Berger & Co.,* 176 F. Supp. 149 (E.D., N.Y. 1958) (leave to amend conditioned upon deleting 34 paragraphs from the

amended pleading as being superfluous). It is not even arguably an abuse of discretion for the trial court to require, as it did here, that the amended complaint comply with the relatively simple burden of being intelligible and in proper form.

Petitioners' second amended complaint did not include a claim for relief based upon alleged violations of civil rights, and therefore, the Ohio Appeals Court for the Second Appellate District upheld the grant of summary judgment in favor of the Dayton Board based upon the immunity provisions of Section 2744.01, *et seq.* of the Ohio Revised Code.

IV. PETITIONERS' AUTHORITY DISTINGUISHED

Petitioners rely principally upon *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 103 L. Ed. 2d, 109 S. Ct. 998 (1989), and *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989) (*cert. den.* 107 L. Ed. 2d 835, 110 S. Ct. 840, 1990). These cases are clearly not applicable to the instant facts. In both, unlike here, a civil rights claim was properly pleaded before the court. *DeShaney,* however, provides positive support for the proposition that had a civil rights claim been before the trial court, the trial court could have properly found such claim to be without merit. This Court held in *DeShaney* that as a general matter, a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. In the instant case, it was clearly established that Slaughter, the alleged attacker, was not an employee of the Dayton Board. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) establishes the fact that supervisory liability cannot be the basis for civil rights liability of the governmental unit, but rather such a claim must be based upon custom, practice, usage, or policy, if any such claim is to be found to exist at all. In the instant case, no such policy, etc. was pled, nor did any of the information before the trial court at the time of its grant of summary judgment raise a genuine issue of fact as to the possible existence of such a policy, etc. Thus, Petitioners' reliance on *DeShaney* is misplaced.

Stoneking, supra, is inapposite. *Stoneking* dealt with abuse of school children by an employee of the school district, not the situation present in this case, and further involved allegations of a pattern of abuse and the

failure of specific administrative employees to take any action to deal with these situations. In the present case, it was clear that Slaughter was not an employee of the Dayton Board.

Finally, Petitioners rely on *Felder v. Casey*, 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988). This case held that the Supremacy Clause pre-empts state statutory limitations which placed additional burdens upon litigants seeking redress in state courts for civil rights claims over and beyond those established for Federal Courts. As a matter of law, this is a correct statement. But, this was recognized by the Ohio Court of Appeals for the Second Appellate District when it reviewed this case. The Appeals Court correctly pointed out that at the time of the granting of the summary judgment motion, there simply were no federal civil rights claims before the trial court. Thus, this case does not deal with the issue of some state statute placing an additional burden on the Petitioners, but with a second amended complaint that failed to raise a civil rights claim.

CONCLUSION

This case presents no issue of the State of Ohio placing any burden on the Petitioners in bringing a federal civil rights claim in state court that would not also exist in the Federal system. This case does present a situation in which Petitioners failed to allege a civil rights claim for relief and in which summary judgment was properly granted to the Dayton Board by the trial court on the common law negligence claim that was advanced by the Petitioners.

Since there is no question of Constitutional or federal law presented by this case, it is respectfully submitted that the Petitioners have failed to sustain their burden of establishing that there are sufficient reasons to grant the writ of certiorari in this case.

Respectfully submitted,

HOWARD P. KRISHER
Counsel of Record
BIESER, GREER & LANDIS, of Counsel
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402-1908
(513) 223-3277
Attorneys for Respondent
Dayton Board of Education

Of Counsel:
JOHN F. LENEHAN
DWIGHT A. WASHINGTON
348 West First Street
Dayton, Ohio 45402
(513) 461-3091

APPENDIX

DECISION AND ENTRY OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

(Filed February 3, 1989)

Case No. 87-3339

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO GENERAL DIVISION

MARY JONES, *et al.*,
Plaintiffs,

v.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

DECISION AND ENTRY

(Deferring Ruling on Plaintiffs' Motion for Leave to Amend the First Amended Complaint)

(Judge Robert M. Brown)

This cause is before the Court on the motion of the Plaintiffs, through counsel, filed herein on February 1, 1989, seeking an order of this Court granting them leave to file a second amended complaint. The motion is supported by a memorandum to which a draft of a second amended complaint is attached. This action was commenced by the filing of a complaint on October 22,

1987. On December 22, 1988, counsel for Plaintiffs sought leave to file a first amended complaint, which was granted. Another motion to amend the complaint was filed on January 31, 1989, and now on February 1, 1989, another motion to amend the complaint has been filed.

To indicate that this case has suffered a tortuous course of procedure to this point in time is to minimize the fact. While some of the problems are not of the Plaintiffs' doing, many of them are. The amendments now sought to the complaint should never have been required had the complaint been properly drafted in the first instant, and certainly not after a delay of sixteen months. While Civil Rule 15(A) requires that leave to amend be liberally given, the Court has too many other matters [2] requiring attention to be involved in this detail, this frequently, as well as the large demand on the Court's time with regard to discovery problems.

Before granting further leave to amend the complaint, the Court is requiring that counsel for Plaintiffs review and carefully consider the provisions of Civil Rule 8(A), which requires in part that a pleading set forth a claim for relief and shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Counsel shall also read and consider Civil Rule 8(E)(1) which provides that each allegation in "a pleading shall be simple, concise, and direct." Finally, in this connection, counsel's attention is drawn to the appendix of forms attached to the Civil Rules to observe and study examples of proper pleading under the rules.

The tendered second amended complaint is replete with superfluous and unnecessary allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend.

After doing all the foregoing, counsel for Plaintiffs may then tender a proposed second amended complaint to the Court, at which time the Court, after carefully reviewing the proposed pleading, will determine if the Court's instructions have been followed. If the pleading is in proper form, leave to file it will be promptly granted.

As indicated above, questions involving discovery have involved an inordinate amount of time from the Court. Counsel's attention is drawn to the provisions of Rule 2.19 of this court. [3] That rule outlines in some detail the conduct which this Court expects of counsel in conducting discovery. Counsel are also directed to review Civil Rules 26 through 37 with respect to the various means of discovery and shall conduct the discovery consistent with those rules. In any event, it is ORDERED that all discovery in this action cease and desist until a second amended complaint is filed, after leave of Court as above indicated. As soon as that is accomplished, counsel may then proceed with discovery in an orderly fashion in compliance with the Civil Rules and the Local Rule.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

A P P R O V E D :

/s/ ROBERT M. BROWN, *Judge*

ALVARENE N. OWENS, Attorney for Plaintiffs, 1101 Salem Avenue, Dayton, Ohio 45406 275-6842

NWABUEZE V. OKOCHA, Attorney for Plaintiffs, 650 Rockefeller Building, 614 Superior Avenue, N.W., Cleveland, Ohio 44113 216-574-9400

HOWARD P. KRISHER, Attorney for Defendant, Dayton Board of Education, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402 223-3277

GREGORY T. SCOTT, Attorney for Defendant, Eddie Slaughter, 860 Talbott Tower, Dayton, Ohio 45402 461-9331

JOHN P. PETZOLD, Attorney for Defendant, Miami Liberty Cab Co., 900 Talbott Tower, Dayton, Ohio 45402 223-1201

ROBIN R. FREEMAN, Attorney for Defendant, Miami Liberty Cab Co., 203 BancOhio Building, Springfield, Ohio 45502 324-5541

JACK D. REAY, Bailiff

A5

EXPARTE MOTION NON PRO TUNC PERMITTING AMENDMENT TO PLAINTIFFS' FIRST AMENDED COMPLAINT'S CAPTION TO CONFORM TO THE COMPLAINT'S ALLEGATIONS

Case No. 87-3339

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

MARY JONES, *et al.*,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

Now comes Plaintiffs, Mary Jones as Mother and Guardian on behalf of Karen Jones, an incompetent, Mary Jones, Next of Friend and Guardian on behalf of Sally Jones, a minor and Mary Jones, and appearing before the Court exparte moves the Court for leave to amend its First Amended Complaint non pro tunc as of January 12, 1989, the date of the filing of the First Amended Complaint by the Court, for the reasons as set

forth in the Memorandum which follows and pursuant to Plaintiffs' proposed First Amended Complaint (see attached Exhibit "A," incorporated by reference herein).

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUEZE OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

MEMORANDUM

Due to clerical error in the typing of the proposed Amended Complaint and inadvertence in the preparation of the Motion which contained it as Plaintiff's EXHIBIT "A," PLAINTIFF'S FIRST AMENDED COMPLAINT fully set forth and outlined the additional parties and their theories in the seventy-eight (78) allegations in the body of the Amended Complaint, but *did not* set forth the additional parties in the Amended Complaint's *caption*. To set forth the parties in the caption was clearly one of the main purposes of the amendment, along with setting forth the parties' attendant allegations. The fact the Complaint did set out the allegations and not the parties is yet other apparent evidence of Plaintiffs' obvious inadvertence. Perhaps the clerical presumption of boiler-plate case caption in spite of instructions otherwise can be appreciated in the flurry of this case's pleadings which have only begun.

Through inadvertence and excusable neglect the case caption read:

> MARY JONES,
> Mother and Guardian
> on behalf of
> Karen Jones, an incompetent
> 2818 Jerome
> Dayton, Ohio 45408

When in truth and in conformity with the allegations set forth in the Amended Complaint's allegations 1 through 78, the caption should have read:

> MARY JONES, As Mother
> and Guardian on behalf
> of Karen Jones, an incompetent
> 336 Brookside Drive
> Dayton, Ohio 45406

MARY JONES, Next of Friend
and Guardian on behalf of
Sally Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

and

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406

Plaintiffs submit that for the aforegoing reasons, good cause has been shown to so amend to reflect the applicable case caption. In addition, Plaintiff refers the Court to its previous arguments in its previously submitted Motion to Amend which cites Civil Rule 15(A) which states that leave [to amend] shall be fully given when justice so requires. Certainly in regards to the additional parties Sally Jones, the sixteen (16) month old minor child of Defendant's rape and in regards to Mary Jones, her grandmother [who suffered the loss of consortium of Plaintiff, Karen, her daughter and Sally's mother], said justice requisite is met.

Also, as with Plaintiff's previously filed Motion to Amend, Plaintiffs submit that Defendants are in no way prejudiced by the filing of the subject Complaint in that the Amended Complaint set forth each of the parties and the specific legal theory upon which of their allegations was based. Defendants are not "caught" by surprise because the parties and allegations were there in the Complaint upon which the Court entered its Judgment granting Plaintiffs' leave to so amend.

Therefore, it is hereby moved that the Court amend the Complaint to so state or that in the alternative either the Court file the attached Second Amended Complaint

which so states or that Plaintiffs be allowed to file said Second Amended Complaint which so states.

Moreover, Plaintiffs submit that in light of the present exparte proceedings, should Defendants object, they may do so at some future date and thereby allow Plaintiffs to proceed forthwith upon the full merits of the case, again the intent of the Amended Complaint.

/s/ ALVARENE N. OWENS
NWABUEZE V. OKOCHA
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon John Lenehan, 348 W. First Street, Dayton, Ohio 45402; Howard Krisher, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402; John Petzold, 900 Talbott Tower, Dayton, Ohio 45402; and Gregory Scott, 860 Talbott Tower, Dayton, Ohio 45402 on this 25th day of January, 1989 by hand delivery.

/s/ *ALVARENE N. OWENS*
NWABUEZE OKOCHA
Attorneys for Plaintiffs

EXHIBIT A

Case No. 87-3339

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and
Guardian on behalf of
Karen Jones, an incompetent
336 Brookside Drive
Dayton, Ohio 45406,

MARY JONES, Next Friend and
Guardian on behalf of Sally
Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406,

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION
JOHN LENEHAN
Legal Counsel
348 W. First Street
Dayton, Ohio 45402,

MIAMI LIBERTY CAB CO.
FRANK M. ROOT
Statutory Agent
1406 Third National Building
Dayton, Ohio 45402,

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418,
Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL

Now comes the Plaintiffs, Mary Jones and Karen Jones, a minor by and through her next friend, mother and guardian, Mary Jones, and for her First Amended Complaint aver as follows:

1. Plaintiff, Karen Jones, is a handicapped individual pursuant to state and federal law, an incompetent and a minor residing in Dayton, Ohio.

2. Plaintiff, Mary Jones, is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

3. Defendant, Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), pursuant to the provisions of Title 33 of Ohio Revised Code.

4. Defendant, Miami-Liberty Cab Co., is at all times relevant hereto, a taxicab company, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

5. Defendant, Eddie Slaughter, is at all times relevant hereto, a resident of the City of Dayton, and an employee or agent of Defendant, Miami-Liberty Cab Co.

6. At all times relevant hereto, all of the Defendants acted under color of state law.

7. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff, Karen Jones.

8. Defendant DBOE has a statutory duty to provide education to students within its jurisdiction, including but not limited to, providing transportation necessary for the education of students.

9. Plaintiff, Karen Jones, was identified by the DPS as an emotionally disturbed child by the time she entered the school system.

10. DPS also identified Plaintiff, Karen Jones, as a mentally retarded and blind.

11. Based on evaluations and tests administered by the DPS, Plaintiff, Karen Jones, was placed in an educational institution for the blind and for emotionally disturbed children consistent with the Defendant DBOE's statutory responsibility.

12. Plaintiff, Karen Jones, is entitled to instruction from the DPS pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1412(1), 1413(a) and pursuant to state law.

13. The EHA requires DPS to ensure an "free appropriate education" for all disabled children within its jurisdiction.

14. Defendant DBOE contracted the Ohio State School for the Blind, Columbus, Ohio for placement of Karen Jones.

15. DPS designed Plaintiff Karen Jones' educational plan.

16. Subsequently, Defendant DBOE entered into an agreement with the Ohio State School for the Blind consistent with its education plan for Plaintiff, Karen Jones.

17. Transportation is essential for the education of Plaintiff, Karen Jones, in the Ohio State School for the Blind.

18. In compliance with its statutory duty, Defendant DBOE arranged for the transportation of Plaintiff, Karen Jones, to the Ohio State School for the Blind, with Defendant, Miami-Liberty Cab Co.

19. Defendant DBOE employed Defendant Miami Liberty Cab Co. to transport its students, including but not limited to blind and retarded students, such as Plaintiff, Karen Jones, to schools.

20. At all times relevant hereto, Defendant Slaughter was acting as an employee or agent of the Defendant Miami Liberty Cab Co.

21. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiff, that it is a taxicab company or a common carrier, engaged in the business of transportation of persons or property for compensation.

22. Defendant DBOE authorized Defendant Miami-Liberty Cab Co. to transport Plaintiff, Karen Jones.

23. Defendant, DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.

24. Defendant Miami-Liberty Cab Co. voluntarily assumed these obligations by contract.

25. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff, Karen Jones, to Defendant Miami-Liberty Cab Co.

26. Over a period of several years, Defendant Miami-Liberty Cab Co. transported Plaintiff, Karen Jones, from Dayton, Ohio to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.

27. Defendant Miami-Liberty Cab Co. received over five thousand (5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.

28. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiffs, that Defendant Slaughter was acting as its employee or agent.

29. Plaintiffs and Defendant DBOE reasonably believed that Defendant Slaughter was acting as an employee or agent of the Defendant Miami-Liberty Cab Co.

30. Defendant, DBOE and Plaintiffs relied on the aforestated representations to their own detriment.

31. On November 16, 1986, Plaintiff, Karen Jones, was transported in Defendant Miami-Liberty Cab Co.'s vehicles from Dayton, Ohio to Columbus, Ohio.

32. Defendant DBOE paid for the transportation of Plaintiff, Karen Jones, by Defendant Miami-Liberty Cab Co. to the Ohio State School for the Blind.

33. Defendants Miami-Liberty Cab Co. and DBOE were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.

34. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.

35. On November 16, 1986, Plaintiff Karen Jones was transported in Defendant Miami-Liberty Cab Co.'s vehicle.

36. Defendant Slaughter was the driver of Defendant Miami-Liberty Cab Co.'s vehicle that transported Plaintiff Karen Jones.

37. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter sexually molested and maliciously and unlawfully assaulted and committed acts of gross sexual imposition upon Plaintiff Karen Jones by unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

38. Defendant Slaughter sexually molested and abused Plaintiff Karen Jones.

39. Defendant Slaughter's conduct was outrageous, malicious, wanton and oppressive.

40. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

41. As a direct and proximate result of the sexual assault and abuse of Plaintiff Karen Jones, Plaintiffs have suffered and continue to suffer extreme pain, physical harm, shock, mental anguish, and emotional distress.

42. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.

43. As a direct and proximate result of Defendant Slaughter's unlawful sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

44. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Sally Jones.

45. Defendant Slaughter is the natural and biological father of Sally Jones.

46. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Sally Jones' child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority.

47. The Defendants maliciously and wantonly interfered and disrupted Plaintiff Karen Jones' education. This punishment is cruel, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.

48. As a direct and proximate result of Defendants' reckless, wanton, willful, malicious and oppressive acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

49. Plaintiffs have suffered severe mental and emotional distress such that Plaintiff Karen Jones is afraid to attend school.

50. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

51. Defendant Miami-Liberty Cab Co. undertook to provide transportation for Plaintiff Karen Jones.

52. Defendant Miami-Liberty Cab Co. had a duty to exercise reasonable care for the safety of Plaintiff Karen Jones.

53. Defendant Miami-Liberty Cab Co. breached its duty of care to Plaintiff Karen Jones by hiring or retaining unqualified or irresponsible employees and personnel; by failing to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones by failing to monitor the quality of care being provided to its passengers.

54. As a direct and proximate result of Defendant Miami-Liberty Cab Co.'s breach of its duty of care, Plaintiffs were injured.

55. Defendant DBOE undertook to provide transportation for Plaintiff Karen Jones.

56. Defendant DBOE had a duty to exercise due skill and care in selecting, hiring, firing and retaining responsible employees and services, but failed to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones and failed to monitor the quality of care being provided to its students.

57. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.

58. As a direct and proximate result of Defendant DBOE's breach of its duty of care, Plaintiffs were injured.

59. Defendants DBOE and Miami-Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also

have a duty to protect and maintain a safe, violent-free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control the practices described in paragraphs 1 through 8 of this First Amended Complaint.

60. Defendants DBOE and Miami-Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.

61. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPS, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami-Liberty Cab Co. Defendants DBOE and Miami-Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.

62. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiff.

63. The denial of adequate education to Plaintiff Karen Jones, deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing Plaintiffs irreparable injury.

64. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under

the Eighth and Fourteenth Amendments to the United States Constitution, causing them irreparable injury pursuant to 42 U.S.C. Section 1983.

65. As a direct and proximate result of Defendants' actions, Plaintiff have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anxiety, indignity, terror, and other damages to be adduced at trial.

FIRST CLAIM

66. Plaintiffs reallege and incorporate by reference paragraphs 1 through 65 of the First Amended Complaint as if fully rewritten herein.

67. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.

SECOND CLAIM

68. Plaintiffs reallege and incorporate by reference paragraphs 1 through 67 of the First Amended Complaint as if fully rewritten herein.

69. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.

THIRD CLAIM

70. Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 of the First Amended Complaint as if fully rewritten herein.

71. Defendants DBOE and Miami-Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the

patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

72. Plaintiffs reallege and incorporate by reference paragraphs 1 through 71 of the First Amended Complaint as if fully rewritten herein.

73. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

74. Plaintiffs reallege and incorporate by reference paragraphs 1 through 73 of the First Amended Complaint as if fully rewritten herein.

75. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

76. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

SIXTH CLAIM

77. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of the First Amended Complaint as if fully rewritten herein.

78. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and compansionship.

SEVENTH CLAIM

79. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of the First Amended Complaint as if fully rewritten herein.

80. As a direct and proximate result of Defendants' actions, Plaintiff, Sally Jones, has suffered a loss of her mother, Karen Jones', society and companionship.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award damages against Defendants joint and severally;

2. Award Plaintiffs compensatory damages against Defendants in the amount of $1,520,000.00 as per prayer for relief No. 1;

3. Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 as per prayer for relief No. 1;

4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;

5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. Section 1988 as per prayer for relief No. 1;

6. Demand for a jury trial pursuant to Civil Rule 38; and,

7. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

PLAINTIFFS' SECOND MOTION TO AMEND ITS FIRST AMENDED COMPLAINT TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Case No. 87-3339
(Judge Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

MARY JONES, *et al.*,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

Now come Plaintiffs, Mary Jones, as Mother and Guardian on behalf of Karen Jones, an incompetent, Mary Jones, as Next Friend and Guardian on behalf of Sally Jones, a minor, and Mary Jones come before the Court by and through counsel, Alvarene N. Owens and Nwabueze Okocha, and move the Court to amend Plaintiffs' First Amended Complaint to Plaintiffs' SECOND AMENDED COMPLAINT for the reasons as set forth in the Memorandum which follows.

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUEZE OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400
Attorneys for Plaintiffs

MEMORANDUM

Plaintiffs' counsel filed Plaintiffs' Motion to Amend and its attached proposed Plaintiffs' First Amended Complaint outlining Plaintiffs' theories and parties in the Complaint's body of allegations, but not reflecting the same parties in the Amended Complaint's *caption* was error and inadvertence. The error is clerical boiler-plating of the original Complaint and subsequent pleadings' caption along with oversight by counsel at the point in time of its submission with the Motion.

The First Amended Complaint's pertinent allegations containing the additional theories, *and* additional parties, began at the First Claim and allegation 66 and continues on to the end of the Amended Complaint at the Seventh Claim and allegation 80. In each, "Plaintiffs" are alleged, incorporating subsequent allegations along with further constitutional and tortious acts of Defendants.

Specifically at allegation 78 it states in part:

> ". . . Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship."

All of the above Plaintiffs referred to in the body of the allegations are evidence of Plaintiffs' original intent and of counsel's inadvertence.

Plaintiffs now submit that the caption reflect the controlling allegations. Certainly, the present Motion specifically sets forth both allegations and parties as should have been done in the first instance (see attached Exhibit A, Plaintiffs' proposed Plaintiffs' SECOND AMENDED COMPLAINT, incorporated by reference herein).

And finally, in the interest of procedural efficiency, Plaintiffs simultaneously propose the Seventh Claim and allegations 79 and 80 contained therein as an additional

theory in Plaintiffs' SECOND AMENDED COMPLAINT in regards to the minor child, Sally Jones', loss of her mother, incompetent Karen Jones', society and compansionship.

At this juncture, Plaintiffs will again refer the Court to the non prejudicial effect on Defendants and the language of Rule 16 that leave be freely given.

Respectfully submitted,

/s/ ALVARENE N. OWENS
NWABUEZE OKOCHA
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Howard Krisher, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402; John Petzold, 900 Talbott Tower, Dayton, Ohio 45402; Gregory Scott, 860 Talbott Tower, Dayton, Ohio 45402; John Lenehan, 348 W. First Street, Dayton, Ohio 45402; and Robin Freeman, P.O. Box 1488, 2nd Floor, BancOhio Building, Springfield, Ohio 45501 on this 1st day of February, 1989 by hand delivery.

/s/ ALVARENE N. OWENS
NWABUEZE OKOCHA
Attorneys for Plaintiffs

EXHIBIT A

Case No. 87-3339

(Judge Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and
Guardian on behalf of
Karen Jones, an incompetent
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES, as Next Friend and
Guardian on behalf of Sally
Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION
348 W. First Street
Dayton, Ohio 45402

MIAMI LIBERTY CAB CO.
1406 Third National Building
Dayton, Ohio 45402

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418,
Defendants.

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Now come the Plaintiffs, Mary Jones, and Karen Jones and Sally Jones, minors, by and through their next friend, mother and guardian, Mary Jones, and for their Second Amended Complaint aver as follows:

1. Plaintiff, Karen Jones, is a handicapped individual pursuant to state and federal law, an incompetent and a minor residing in Dayton, Ohio.

2. Plaintiff, Mary Jones, is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

3. Defendant, Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), pursuant to the provisions of Title 33 of Ohio Revised Code.

4. Defendant, Miami-Liberty Cab Co., is at all times relevant hereto, a taxicab company, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

5. Defendant, Eddie Slaughter, is at all times relevant hereto, a resident of the City of Dayton, and an employee or agent of Defendant, Miami-Liberty Cab Co.

6. At all times relevant hereto, all of the Defendants acted under color of state law.

7. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff, Karen Jones.

8. Defendant DBOE has a statutory duty to provide education to students within its jurisdiction, including but not limited to, provided transportation necessary for the education of students.

9. Plaintiff, Karen Jones, was identified by the DPS as an emotionally disturbed child by the time she entered the school system.

10. DPS also identified Plaintiff, Karen Jones, as a mentally retarded and blind.

11. Based on evaluations and tests administered by the DPS, Plaintiff Karen Jones, was placed in an educational institution for the blind and for emotionally disturbed children consistent with the Defendant DBOE's statutory responsibility.

12. Plaintiff, Karen Jones, is entitled to instruction from the DPS pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1412(1), 1413(a) and pursuant to state law.

13. The EHA requires DPS to ensure a "free appropriate education" for all disabled children within its jurisdiction.

14. Defendant DBOE contacted the Ohio State School for the Blind, Columbus, Ohio for placement of Karen Jones.

15. DPS designed Plaintiff Karen Jones' educational plan.

16. Subsequently, Defendant DBOE entered into an agreement with the Ohio State School for the Blind consistent with its education plan for Plaintiff, Karen Jones.

17. Transportation is essential for the education of Plaintiff, Karen Jones, in the Ohio State School for the Blind.

18. In compliance with its statutory duty, Defendant DBOE arranged for the transportation of Plaintiff, Karen Jones, to the Ohio State School for the Blind, with Defendant, Miami-Liberty Cab Co.

19. Defendant DBOE employed Defendant Miami Liberty Cab Co. to transport its students, including but not limited to blind and retarded students, such as Plaintiff, Karen Jones, to schools.

20. At all times relevant hereto, Defendant Slaughter was acting as an employee or agent of the Defendant Miami-Liberty Cab Co.

21. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiffs, that it is a taxicab company and/or a common carrier, engaged in the business of transportation of persons or property for compensation.

22. Defendant DBOE authorized Defendant Miami-Liberty Cab Co. to transport Plaintiff, Karen Jones.

23. Defendant DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.

24. Defendant Miami-Liberty Cab Co. voluntarily assumed these obligations by contract.

25. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff, Karen Jones, to Defendant Miami-Liberty Cab Co.

26. Over a period of several years, Defendant Miami-Liberty Cab Co. transported Plaintiff, Karen Jones, from Dayton, Ohio, to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.

27. Defendant Miami-Liberty Cab Co. received over five thousand (5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.

28. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiffs, that Defendant Slaughter was acting as its employee or agent.

29. Plaintiffs and Defendant DBOE reasonably believed that Defendant Slaughter was acting as an employee or agent of the Defendant Miami-Liberty Cab Co.

30. Defendant, DBOE and Plaintiffs relied on the aforestated representations to their own detriment.

31. On November 16, 1986, Plaintiff, Karen Jones, was transported in Defendant Miami-Liberty Cab Co.'s vehicle from Dayton, Ohio to Columbus, Ohio.

32. Defendant DBOE paid for the transportation of Plaintiff, Karen Jones, by Defendant Miami-Liberty Cab Co. to the Ohio State School for the Blind.

33. Defendants Miami-Liberty Cab Co. and DBOE were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.

34. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.

35. On November 16, 1986, Plaintiff Karen Jones was transported in Defendant Miami-Liberty Cab Co.'s vehicle.

36. Defendant Slaughter was the driver of Defendant Miami-Libelrty Cab Co.'s vehicle that transported Plaintiff Karen Jones.

37. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter sexually molested and maliciously and unlawfully assaulted and committed acts of gross sexual imposition upon Plaintiff Karen Jones by unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

38. Defendant Slaughter sexually molested and abused Plaintiff Karen Jones.

39. Defendant Slaughter's conduct was outrageous, malicious, wanton and oppressive.

40. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

41. As a direct and proximate result of the sexual assault and abuse of Plaintiff Karen Jones. Plaintiffs have suffered and continue to suffer extreme pain, physical harm, shock, mental anguish, and emotional distress.

42. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.

43. As a direct and proximate result of Defendant Slaughter's unlawful sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

44. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Sally Jones.

45. Defendant Slaughter is the natural and biological father of Sally Jones.

46. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Sally Jones' child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority.

47. The Defendants maliciously and wantonly interfered with and disrupted Plaintiff Karen Jones' education. This punishment is cruel, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.

48. As a direct and proximate result of Defendants' reckless, wanton, willful, malicious and oppressive acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

49. Plaintiffs have suffered severe mental and emotional distress such that Plaintiff Karen Jones is afraid to attend school.

50. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

51. Defendant Miami-Liberty Cab Co. undertook to provide transportation for Plaintiff Karen Jones.

52. Defendant Miami-Liberty Cab Co. had a duty to exercise reasonable care for the safety of Plaintiff Karen Jones.

53. Defendant Miami-Liberty Cab Co. breached its duty of care to Plaintiff Karen Jones by hiring or retaining unqualified or irresponsible employees and personnel; by failing to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones by failing to monitor the quality of care being provided to its passengers.

54. As a direct and proximate result of Defendant Miami-Liberty Cab Co.'s breach of its duty of care, Plaintiffs were injured.

55. Defendant DBOE undertook to provide transportation for Plaintiff Karen Jones.

56. Defendant DBOE had a duty to exercise due skill and care in selecting, hiring, firing and retaining responsible employees and services, but failed to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones and failed to monitor the quality of care being provided to its students.

57. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.

58. As a direct and proximate result of Defendant DBOE's breach of its duty of care, Plaintiffs were injured.

59. Defendants DBOE and Miami-Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violence-free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control the practices described in paragraphs 1 through 48 of this Second Amended Complaint.

60. Defendants DBOE and Miami-Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.

61. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPS, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami-Liberty Cab Co. Defendants DBOE and Miami-Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.

62. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiff.

63. The denial of adequate education to Plaintiff Karen Jones, deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing Plaintiffs irreparable injury.

64. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing them irreparable injury.

65. As a direct and proximate result of Defendants' actions, Plaintiff have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anxiety, indignity, terror, and other damages to be adduced at trial for which there is no adequate remedy under state law.

FIRST CLAIM

66. Plaintiffs reallege and incorporate by reference paragraphs 1 through 65 of the Second Amended Complaint as if fully rewritten herein.

67. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.

SECOND CLAIM

68. Plaintiffs reallege and incorporate by reference paragrahs 1 through 67 of the Second Amended Complaint as if fully rewritten herein.

69. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.

THIRD CLAIM

70. Plaintiffs reallege and incorporate by reference paragarphs 1 through 69 of the Second Amended Complaint as if fully rewritten herein.

7.1 Defendants DBOE and Miami-Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

72. Plaintiffs reallege and incorporate by reference paragraphs 1 through 71 of the Second Amended Complaint as if fully rewritten herein.

7.3 The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

74. Plaintiffs reallege and incorporate by reference paragraphs 1 through 73 of the Second Amended Complaint as if fully rewritten herein.

75. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

76. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment

and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

SIXTH CLAIM

77. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of the Second Amended Complaint as if fully rewritten herein.

78. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.

SEVENTH CLAIM

79. Plaintiffs reallege and incorporate by reference paragraphs 1 through 78 of the Second Amended Complaint as if fully rewritten herein.

80. As a direct and proximate result of Defendants' actions, Plaintiff, Sally Jones, has suffered a loss of her mother, Karen Jones', society and companionship.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award damages against Defendants joint and severally;

2. Award Plaintiffs compensatory damages against Defendants in the amount of $1,520,000.00 as per prayer for relief No. 1;

3. Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 as per prayer for relief No. 1;

4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;

5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. Section 1988 and the EHA as per prayer for relief No. 1;

6. Demand for a jury trial pursuant to Civil Rule 38; and,

7. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

PLAINTIFFS' TENDER OF SECOND AMENDED COMPLAINT

Case No. 87-3339

(Judge Brown)

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

MARY JONES, *et al.*,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

In compliance with the Court's Order of February 3, 1989, Plaintiffs' hereby submit the attached Second Amended Complaint for approval.

Respectfully submitted,

ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

NWABUEZE OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel on this 9th day of February, 1989 by regular U.S. Mail.

ALVARENE N. OWENS
NWABUEZE OKOCHA
Attorneys for Plaintiffs

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Case No. 87-3339

(Judge Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and
Guardian on behalf of
Karen Jones, a minor and an
incompetent
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES, as Next Friend and
Guardian on behalf of Sally
Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

and

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION
348 W. First Street
Dayton, Ohio 45402

MIAMI LIBERTY CAB CO.
1406 Third National Building
Dayton, Ohio 45402

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418,
Defendants.

Now comes the Plaintiffs, Mary Jones, and Karen Jones and Sally Jones, minors, by and through their next friend, mother and guardian, Mary Jones, and for their Second Amended Complaint aver as follows:

1. Plaintiff Karen Jones is a minor, blind, emotionally disturbed, mentally retarded, handicapped and an incompetent individual pursuant to state and federal law, residing in Dayton, Ohio.

2. Plaintiff Sally Jones is a minor, and is the daughter of Plaintiff Karen Jones.

3. Plaintiff Mary Jones is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

4. Defendant Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), and vested with the statutory duty pursuant to the provisions of Title 33 of Ohio Revised Code.

5. Defendant Miami-Liberty Cab Co. is at all times relevant hereto, a taxicab company and/or a common carrier, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

6. Defendant Eddie Slaughter is at all times relevant hereto, a resident of the City of Dayton, and employed as a cab driver by, or as an agent of Defendant Miami-Liberty Cab Co.

7. At all times relevant hereto, all of the Defendants acted under color of state law.

8. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff Karen Jones.

9. DPS evaluated and designed Plaintiff Karen Jones' educational plan and placed her in the Ohio State School for the Blind pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1400 *et seq.* and pursuant to state law.

10. In compliance with its statutory duty, Defendant DBOE arranged and employed Defendant Miami-Liberty Cab Co. for the transportation of Plaintiff Karen Jones to the Ohio State School for the Blind by contract. A true and accurate copy of the contract is in the possession of Defendants DBOE and Miami-Liberty Cab Co.

11. Defendant DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.

12. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff Karen Jones to Defendant Miami-Liberty Cab Co.

13. Over a period of several years, Defendant Miami-Liberty Cab Co. transported Plaintiff Karen Jones from Dayton, Ohio, to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.

14. Defendant Miami-Liberty Cab Co. received over five thousand ($5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.

15. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter sexually molested and maliciously and unlawfully assaulted and committed acts of gross sexual imposition upon Plaintiff Karen Jones by unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

16. Defendant Slaughter's conduct was outrageous, malicious, reckless, wanton and oppressive.

17. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

18. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.

19. As a direct and proximate result of Defendant Slaughter's unlawful sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

20. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Plaintiff Sally Jones.

21. Defendant Slaughter is the natural and biological father of Plaintiff Sally Jones.

22. Defendants Miami-Liberty Cab Co. and DBOE were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.

23. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.

24. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Plaintiff Sally Jones' child care, necessities, medical, educational and recreational expenses until Plaintiff Sally Jones reaches majority.

25. The Defendants maliciously, recklessly, and wantonly interfered with and disrupted Plaintiff Karen Jones' education. This punishment is cruel and unusual, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.

26. As a direct and proximate result of Defendants' reckless, wanton, willful, malicious and oppressive acts, Plaintiffs have suffered great humiliation, shame, embarrassment, and emotional distress.

27. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

28. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.

29. Defendants DBOE and Miami-Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violence-free environment for the students under their custody and

supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control the practices described in paragraphs 1 through 28 of this Second Amended Complaint.

30. Defendants DBOE and Miami-Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.

31. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPS, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami-Liberty Cab Co. Defendants DBOE and Miami-Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.

32. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiffs.

33. The denial of adequate education to Plaintiff Karen Jones deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the EHA, causing Plaintiffs irreparable injury.

34. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under

the Eighth and Fourteenth Amendments to the United States Constitution and the EHA, causing them irreparable injury.

35. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anxiety, indignity, terror, and other damages to be adduced at trial for which there is no adequate remedy under state law.

FIRST CLAIM

36. Plaintiffs reallege and incorporate by reference paragraphs 1 through 35 of the Second Amended Complaint as if fully rewritten herein.

37. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.

SECOND CLAIM

38. Plaintiffs reallege and incorporate by reference paragraphs 1 through 37 of the Second Amended Complaint as if fully rewritten herein.

39. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.

THIRD CLAIM

40. Plaintiffs reallege and incorporate by reference paragraph 1 through 39 of the Second Amended Complaint as if fully rewritten herein.

41. Defendants DBOE and Miami-Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

42. Plaintiffs reallege and incorporate by reference paragraphs 1 through 41 of the Second Amended Complaint as if fully rewritten herein.

43. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43 of the Second Amended Complaint as if fully rewritten herein.

45. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

46. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

SIXTH CLAIM

47. Plaintiffs reallege and incorporate by reference paragraphs 1 through 46 of the Second Amended Complaint as if fully rewritten herein.

48. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.

SEVENTH CLAIM

49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 49 of the Second Amended Complaint as if fully rewritten herein.

50. As a direct and proximate result of Defendants' actions, Plaintiff Sally Jones, has suffered a loss of her mother, Karen Jones', society and companionship.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award damages against Defendants joint and severally;

2. Award Plaintiffs compensatory damages against Defendants in the amount of $1,520,000.00 as per prayer for relief No. 1;

3. Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 as per prayer for relief No. 1;

4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so

as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;

5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988 and the EHA as per prayer for relief No. 1;

6. Demand for a jury trial pursuant to Civil Rule 38; and,

7. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Case No. 87-3339

(Judge Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and
Guardian on behalf of
Karen Jones, a minor and
an incompetent
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES, as Next Friend and
Guardian on behalf of Sally
Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

and

MARY JONES
336 Brookside Drive
Dayton, 45406,
Plaintiffs,

vs.

DAYTON BOARD OF EDUCATION
348 W. First Street
Dayton, Ohio 45402

MIAMI LIBERTY CAB CO.
1406 Third National Building
Dayton, Ohio 45402

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418,
Defndants.

Now comes the Plaintiffs, Mary Jones, and Karen Jones and Sally Jones, minors, by and through their next friend, mother and guardian, Mary Jones, and for their Second Amended Complaint aver as follows:

1. Plaintiff Karen Jones is a minor, blind, emotionally disturbed, mentally retarded, handicapped and incompetent individual, residing in Dayton, Ohio.

2. Plaintiff Sally Jones is a minor, and is the daughter of Plaintiff Karen Jones.

3. Plaintiff Mary Jones is the mother, next friend and natural guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

4. Defendant Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS").

5. Defendant Miami-Liberty Cab Co. is at all times relevant hereto, a taxicab company and/or a common carrier, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

6. Defendant Eddie Slaughter is at all times relevant hereto, a resident of the City of Dayton, and employed as a cab driver by, or as an agent of Defendant Miami-Liberty Cab Co.

7. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff Karen Jones.

8. DPS evaluated and designed Plaintiff Karen Jones' educational plan and placed her in the Ohio State School for the Blind.

9. Defendant DBOE arranged and employed Defendant Miami-Liberty Cab Co. for the transportation of Plaintiff Karen Jones to the Ohio State School for the Blind by contract. A true and accurate copy of the contract is in the possession of Defendants DBOE and Miami-Liberty Cab Co.

10. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter unlawfully and violently engaged in sexual intercourse with Plaintiff Karen Jones.

11. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

12. As a direct and proximate result of Defendant Slaughter's sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

13. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Plaintiff Sally Jones.

14. As a direct and proximate result of Defendants' acts, Plaintiffs Karen Jones has been severely and permanently injured in that she conceived and bore a

child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Plaintiff Sally Jones' child care, necessities, medical, educational and recreational expenses.

15. As a direct and proximate result of Defendants' acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

16. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award compensatory damages against Defendants joint and severally in the amount of $1,520,000.00; award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00, reasonable attorney fees and costs; award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ALVARENE N. OWENS
ALVARENE N. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

OHIO REVISED CODE

§2305.19 Saving in case of reversal.

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.

* * *

§2744.03 Defenses or immunities of subdivision and employee.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

* * *

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

* * *

§2744.09 Actions and claims exempted from provisions.

This chapter does not apply to, and shall not be construed to apply to, the following:

* * *

(E) Civil claims based upon alleged violation of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

FEDERAL RULES OF CIVIL PROCECURE

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(e) Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed uon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

OHIO RULES OF CIVIL PROCEDURE

RULE 8. GENERAL RULES OF PLEADING

(A) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(E) Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

RULE 16. AMENDED AND SUPPLEMENTAL PLEADINGS

(A) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

RULE 41. DISMISSAL OF ACTIONS

(A) Voluntary Dismissal; Effect Thereof.

(1) By Plaintiff by Stipulation. Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

* * *

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulations, custom or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.